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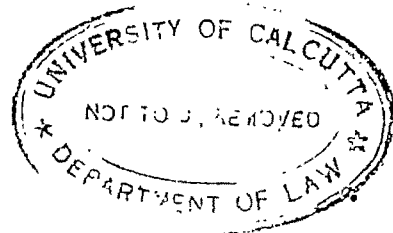
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DECIDED BY THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL ON APPEALS
FROM INDIA
AND
BY THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.

Vol. XXXVII.

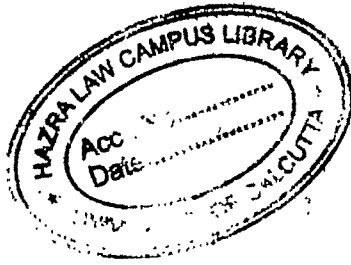
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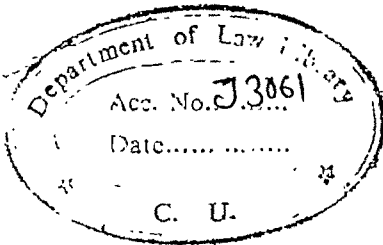
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JUDGES OF THE HIGH COURT.

1923.

Chief Justice.

The Hon'ble Sir Lancelot Sanderson, Kt. K.C.

Puisne Judges.

The Hon'ble Sir Asutosh Mookerjee, Kt. C.S.I.

„ Sir Nalini Ranjan Chatterjea, Kt.
„ Sir Thomas William Richardson, Kt.
„ Sir Hugh Walmsley, Kt.
„ W. E. Greaves.
„ B. B. Newbould.
„ G. C. Rankin.
„ C. C. Ghose.
„ P. L. Buckland.
„ Z. R. Z. Suhrawardy.
„ A. H. Cuming.
„ H. G. Pearson.
„ Bepin Behari Ghose.
„ E. B. H. Panton.
„ Arthur Page.
„ A. J. Chotzner, (*Offg.*).

Advocate General.

Mr. S. R. Das.

Standing Counsel.

Mr. B. L. Mitter.

Senior Government Pleader.

Babu Dwarka Nath Chakravarti.

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The Calcutta Law Journal

Reports.

PRIVY COUNCIL.

PRESENT: *Viscount Cave, Lord Shaw, Sir John Edge and
Mr. Ameer Ali.*

MOHAMMAD ABDUL GHANI KHAN AND ANOTHER

v.

FAKHR JAHAN BEGAM AND OTHERS.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER,
OUDH.]

P. C.

1922.

February, 20, 21.
March, 2, 21.

Mahomedan Law—Suknis—Gift of entire Taluqdari estate—Reservation of usufruct by donor of part—Possession by donee of part only—Constructive possession of the remainder—Oudh Taluqdari Act—Sanad—Meaning of "Successors."

The word "successors" in the Oudh Taluqdari Sanad means those designated persons who succeed in the event of an intestacy and not persons who take by sale, gift or bequest: *Ghulam Abbas Khan v. Amatul Fatima* (1) followed.

The reservation by donor of the usufruct does not by itself make the gift of the property void under Mahomedan law: *Umjad Ally Khan v. Mohumdee Begum* (2) approved.

The object of the Mahomedan law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee, and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift.

For a valid gift *inter vivos* under the Mohammedan law, three conditions are necessary: (a) manifestation of the wish to give on the part of the donor; (b) the acceptance of the donee, either impliedly or expressly; and (c) the taking of

(1) (1921) L. R. 48 I. A. 135.

(2) (1867) 11 M. I. A. 517; 10 W. R. P. C. 25.

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Fakhr Jahan Begam.

possession of the subject-matter of the gift by the donee either actually or constructively.

Where there was a gift of the entire Taluqdari estate, part of which was taken possession of by the donee, constructive possession of the other part must be implied to satisfy the requirements of Mahomedan law as to valid gifts.

Consolidated appeals from two decrees of the Court of the Judicial Commissioner of Oudh, reversing a decree of the Subordinate Judge of Kheri.

The appellants brought the suit for recovery of certain immovable property in Oudh, ejecting the respondents from it. The facts out of which the present litigation arose were fully set out in their Lordships' judgment.

Niamat Ullah was the grantee under a Sanad of the Taluq of Buzurg in Oudh. He bequeathed the estate to his widow Munni Bibi. Part of the property was granted to Munni Bibi in her own right. In 1884 Munni Bibi executed a document by which she made a gift of her entire estate but reserved certain properties to herself to be enjoyed for life. The grantee under the document got into possession of the other properties and had mutation of names effected in respect of them. He paid the Government revenue on the entire estate from the date of gift. The respondents claim under the grantee while the appellants claim the property as the heirs of the grantor. The main questions in the appeal were (i) whether the document of 1884 is to be construed as a gift *inter vivos* or as a disposition by will; and (ii) whether, if it was a gift, possession was taken of the property by the grantee to satisfy the requirements of the Mahomedan law as to gifts. The question as to the right of Munni Bibi to dispose of the property was concluded by the decision of the Board in *Ghulam Abbas Khan v. Amatul Fatima* (1).

The trial Judge held that the document of 1884 was partly a deed of gift and partly a will. As a will, it could confer title to the grantee to the extent of one-third only under Mahomedan law. He granted a decree to the appellants for two-thirds in the suit properties. Both sides appealed to the Court of the Judicial Commissioner. The Judicial Commissioners agreed on the main question before them and held that the document of 1884 was a deed of gift and that it was complete and valid, notwithstanding that there was no actual delivery of possession of some of the properties mentioned in it. They differed on some other points which are not material for the present report.

De Gruyther K. C. and *Brown* for the Appellants : After the decision of the Board in *Ghulam Abbas Khan v. Amatul Fatima* (1) it has to be conceded that Munni Bibi had the ordinary rights of an owner according to Mahomedan law. The deed of 1884 was not testamentary but a present gift as far as the properties in suit are concerned. Mere reservation of a right to the income is not sufficient to invalidate a gift ; *Umjad Ali Khan v. Mohumdee Begum* (2) Delivery of possession is essential for a valid gift under Mahomedan law. The decision in *Umjad Ali Khan's* case (2) is distinguishable from this case on the ground that in that case there was actual delivery of possession. In the present case there was no delivery of possession nor even mutation of names as far as the suit properties are concerned. The gift thus becomes wholly ineffective : *Khajooroonissa v. Roushun Jehan* (3). The question in each case is whether the donor did all that he could to perfect the gift : *Kali Das Mullick v. Kanhya Lal* (4) ; *Mahomed Buksh v. Hosseini Bibi* (5). In this case the donor continued in possession and received the profits and did not even give notice to the tenants. When the donor is in possession there must be delivery to validate a gift : *Chaudri Mehdi Hasan v. Muhammad Hasan* (6) ; *Sadiq Husain v. Hashim Ali* (7).

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Dubs for the Respondents was not called upon.

C. A. V.

The judgment of their Lordships was delivered by

March, 21.

Sir John Edge : These are consolidated appeals by the plaintiffs from two decrees, dated the 19th December, 1917, of the Court of the Judicial Commissioner of Oudh, which reversed the decree, dated the 13th July, 1915, of the Subordinate Judge of Kheri, and dismissed the suit.

The suit was brought on the 20th February, 1914, in the Court of the Subordinate Judge by Mohammad Abdul Ghani Khan and Mohammad Abdul Rahman Khan against Mohammad Hamid Ullah Khan, Musammat. Fakhr Jahan Begam, Musammat Asghari Begam, Musammat Chand Bibi und Pandit Sheo Dayal, for the possession of Mauza Mundia Misir, a 4 annas 5 pies share in Mouza Gundhia.

(1) (1921) L. R. 48 I. A. 735.

(2) (1867) 11 M. I. A. 317, 10 W. R. P. C. 25.

(3) (1876) L. R. 3 I. A. 291.

(4) (1884) L. R. 11 I. A. 218 ; I. L. R. 11 Calc. 121.

(5) (1888) L. R. 15 I. A. 91 ; I. L. R. 15 Calc. 684.

(6) (1906) L. R. 33 I. A. 68.

(7) (1916) L. R. 43 I. A. 212 ; I. L. R. 38 All. 627.

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and two groves, a house and certain sir land in Jalalpur, and for mesne profits. It was a suit of ejectment on title. The plaintiffs alleged that the right to possession of all the properties in suit was in them as the heirs of Musammat Munni Bibi, who had died on the 16th June, 1906, and that the defendants had no title. The defendants, who are the respondents, were not all jointly interested in any of the properties. Some of the defendants were in possession of some of the properties, others of the defendants were in possession of other parts of the properties in suit, but the different titles of all the defendants originated in a document of the 7th March, 1884, which was executed by Munni Bibi, and has been variously construed as a deed of gift and as a will.

Munni Bibi was the widow of Niamat Ullah Khan, who died childless on the 29th August, 1867. Niamat Ullah Khan, Munni Bibi and the plaintiffs, who were her first cousins, were Mohammedans of the Sunni Sect, and the plaintiffs were, when Munni Bibi died in 1906, her heirs, according to the Mohammedan law applicable to Sunnis. The family to which these Mohammedans belonged had, several centuries ago, been Thakurs professing the Hindu religion, who were converted to Islam, and at one period of this suit it was contended by the defendants, or some of them, that the family had always continued to be governed in matters of succession and inheritance by the rules of the Mitakshara and not by the Mohammedan law. That contention has been abandoned.

Niamat Ullah Khan lived in the village of Jalalpur and was a Taluqdar of Oudh. After the Mutiny of 1857 he received from the British Government the Taluqa of Agar Buzurg, which included, with many villages not now in question, all the immovable property in question in this suit except the 4 annas 5 pies share in Mauza Gundhia, which was granted to Munni Bibi on the 15th November, 1876, by the British Government absolutely in her own right. Although Niamat Ullah Khan had died in 1867, his name was entered as that of the Taluqdar of the Taluqa Agar Buzurg in Lists I and II, which were prepared under Act I of 1869. Instances of the names of other persons who had died before 1869 being entered in those Lists occur.

The British Government granted to Niamat Ullah Khan in his lifetime a primogeniture sanad in which the Taluqa Buzurg is described as the estate of Jalalpur in Zillah Mohamdi. That sanad is as follows :—

"C WINGFIELD,

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"Chief Commissioner of Oudh.

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"To

"NIAMAT ULLAH OF JALALPUR.

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"Know all men that whereas by the Proclamation of March, 1858, by His Excellency the Right Honourable the Viceroy and Governor-General of India, all proprietary rights in the soil of Oudh, with a few special exceptions, were confiscated and passed to the British Government, which became free to dispose of them as it pleased, I, Charles John Wingfield, Chief Commissioner of Oudh, under the authority of His Excellency the Governor-General of India in Council, do hereby confer on you the full proprietary right, title, and possession of the estate of Jalalpur in Zillah Mohamdi consisting of the villages as per list attached to the *Kabuliat* you have executed, of which the present Government revenue is Rs. 5,752 (five thousand seven hundred and fifty two).

"Therefore this *sanad* is given you in order that it may be known to all whom it may concern, that the above estate has been conferred upon you and your heirs for ever, subject to the payment of such annual revenue as may from time to time be imposed, and to the conditions of surrendering all arms, destroying all forts, preventing and reporting crime, rendering any service you may be called upon to perform and of showing constant good faith, loyalty, zeal and attachment to the British Government according to the provisions of the engagement which you have executed, the breach of any one of which at any time shall be held to annul the right and title now conferred on you and your heirs.

"It is another condition of this grant that in the event of your dying intestate, or of any of your successors dying intestate, the estate shall descend to the nearest male heir, according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage, gift, bequest, or adoption to whomsoever you please.

"It is also a condition of this grant that you will so far as is in your power promote the agricultural prosperity of your estate, and that all holding under you shall be secured in the possession of all the subordinate rights they formerly enjoyed. As long as the above obligations are observed by you and your heirs in good faith so long will the British Government maintain you and your heirs as proprietors of the above-mentioned estate, in confirmation of which I herewith attach my seal and signature."

The *kabuliat*, mentioned in the *sanad*, related to more than 30

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villages and included Mauza Mundia Misir and Mauza Agar Buzurg (Jalalpur), parts of which are claimed by the plaintiffs in this suit. The plaintiffs do not claim any interest in any of the other villages mentioned in the kabuliya, and do not contend that Munni Bibi was not entitled to give or bequeath those other villages to whom she liked. As will be seen presently, her title to, and interest in, all the villages mentioned in the schedule to the kabuliya was as the devisee of her husband Niamat Ullah Khan.

On the 20th May, 1865, Niamat Ullah Khan made the following will:—

"I am Mohammad Niamat Ullah Khan, Taluqdar of Jalalpur, Parganna Karanpur and Aliganj.

"Whereas the Government has asked for a will from the declarant, and the declarant has no issue and is issueless up to this time, and it is necessary to appoint a legatee after me, I, while in the enjoyment of sound health and perfect intellect, during my life-time, having executed this will, declare that, after me, my wedded wife shall be the owner and possessor of the movable and immovable property, like myself. If the heirs belonging to the brotherhood lay a claim, the same shall be invalid and untenable before the Government. Wherefore I have executed these few presents by way of a will so that it may serve as an authority and be of use in time of need.

"Scribed by Najju Khan, General Agent. Dated 20th May, 1865.

"NIAMAT ULLAH KHAN,

"Taluqdar of Agar Buzurg."

Under the sanad Niamat Ullah Khan had power to bequeath the Taluq of Buzurg (the estate of Jalalpur) to whom he pleased, and under that will the Taluq passed on his death on the 29th August, 1867, to his widow Munni Bibi. At the date of the will of Niamat Ullah Khan, there were living two younger brothers of Niamat Ullah Khan, of whom Lutf Ullah Khan was the elder, and Ibrahim Khan was the younger. Those younger brothers survived Munni Bibi. One question in this case is whether Munni Bibi was a "successor" of Niamat Ullah Khan within the meaning of the sanad; if she was, she had power to make a gift of, or to bequeath, the whole Taluq or any part of it to whom she pleased. If she was not a "successor" of Niamat Ullah Khan within the meaning of the sanad, she had power to make such a gift as would be recognised as a valid gift by the Mohammedan law applicable to Sunnis, of the whole Taluq or of any part of it to whom she pleased.

On the 7th March, 1884, Munni Bibi executed a document which has been construed by the Subordinate Judge as partly a deed of gift and in part a will, and has been construed by the Judicial Commissioners as a deed of gift. As translated by the official translator it is, so far as is material, as follows :—

"I am Thakurain Musammat Munni Bibi, wife of Mohammad Niamat Ullah Khan, Taluqdar of Mirzapur and Jalalpur, Parganas Bhur and Paila, District Kheri.

"Whereas my husband, during his life-time, bequeathed the entire property of the aforesaid Ilaqa to me, and I, in accordance with the said will, am in possession and ownership of the same ; now I, while in sound health and in possession of perfect intellect, without force and reluctance, of my own free will, make a gift of the movable and immovable property, the entire *samindari* and *lambar-dari* estate, &c., in favour of Mohammad Lutf Ullah Khan, son of Mohammad Ibad Ullah Khan, the brother of my husband, the detail whereof is being given below, with the exception of the villages and *sir* lands, &c., of the estates, specified below, which shall, during my life-time, remain in my and my relation's possession, free of rent and without payment of Government revenue ; and I do hereby invest the donee with the power to have the mutation of names effected in his favour. Now I have nothing to do with the gifted property and estate. I shall keep the villages and *sir* lands, which have been exempted hereunder, for my life-time without the power of alienation by mortgage, sale and gift ; and, after me, the donee shall also be the owner of the said exempted property. The donee shall pay the Government revenue of the exempted estate from the Ilaqa with the exception of the revenue of Patti village Gandhia, which I shall pay out of my own pocket. The donee shall pay all the debt with which the estate is encumbered,—I, the donor, having nothing to do therewith. Wherefore I have executed these few words by way of a deed of gift on a stamp of Rs. 600,8 by fixing the value of the property at Rs. 60,000 (sixty thousand), so that it may serve as an authority and be of use when required.

"Detail of the gifted immovable property together with the amount of revenue and the boundaries.

... ..

"Detail of the movable property gifted Rs. 2,610.

... ..

"Detail of the property exempted, Rs. 1,555.

" *Pargana Bhur*, Rs. 1,490.

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" Village Mundia Misir, standing in the name of me, the donor, during life, rent and revenue free 855.

" Patti Gundhia, standing in the name of me, the donor 280.

" Gungipur, included in Hindolna, standing in the name of Mohammad Ibrahim Khan 355.

" Dated 7th March, 1884. Scribed by the Registration Clerk.

" Mark of the signature of the Thakurain Saheba, wife of Mohammad Niamat Ullah Khan, Taluqdar of Mirzapur, autograph."

Pargana Paila Rs. 65.

Sir land at Jalalpur, measuring 135 acres Rs. 65.

" Mr. Kanhaiya Lal, in his judgment on the appeal to the Court of the Judicial Commissioner, gives a slightly different translation of part of the document of the 7th March, 1884, as follows :—

" Now in sound health and full possession of my senses, without any persuasion or compulsion and of my own accord I have gifted my movable and immovable property, all my *samindari* and *lambar-dari* estate, &c., to Mohammad Lutf Ullah Khan, son of Mohammad Ibad Ullah Khan, the brother of my husband, according to the details given below, with the exception of the villages and *sir* land, &c., set out below, name by name which will remain in my possession for the duration of my life and my dependent relatives (sic) free of rent and Government revenue, out of the aforesaid estates. At this time having exempted them I have made a gift, and by virtue of this deed have authorised the donor to get mutation of names made in his favour, and now I have nothing to do with the estate and property gifted ; and such villages and *sir* land aforesaid, as have been *at this time for the duration of my life excepted* (left out) will be kept by me without transfer by mortgage or sale or gift for my lifetime, and after my death the donee will be the proprietor (*malik*) of the aforesaid excepted property ; and of the excepted property the donee will pay the revenue from the *Ilaqa* except of the Patti Mauza Gundhia. Of the Patti Gundhia, I will pay the revenue from my own pocket and the donee will pay all the debts outstanding against the estate. I have nothing to do with them. Therefore these few words have been written by way of a deed of gift of inheritance and proprietorship on a stamp of Rs. 600,8, on a stated value of Rs. 7,0000 as a title deed which will be useful at the time of need."

In the opinion of their Lordships there is no material difference between the two translations, they bear the same meaning. It

should be mentioned that the punctuation in each translation is the punctuation of the person who made the translation. "Patti Mauza Gundhia" was the 4 annas 5 pies share in Mauza Gundhia which the Government had, subject to the payment of the Government revenue, granted to Munni Bibi absolutely in 1876.

On the execution of the document of the 7th March, 1884, Lutf Ullah Khan got actual possession of all the property mentioned in it except Mauza Gungipur and the property now in question in this suit. Of the property now in question Lutf Ullah Khan did not obtain physical possession until Munni Bibi died in 1906.

Lutf Ullah Khan mortgaged, on the 27th November, 1907, the 4 annas 5 pies share in Mauza Gundhia for Rs. 11,000 to the defendant Pandit Sheo Dayal. Lutf Ullah Khan died some years later, leaving him surviving his widow Musammat Chand Bibi and his son Hamid Ullah Khan. Hamid Ullah Khan, after his father's death, transferred to his wives, Musammat Fakhr Jahan Begam and Musammat Ashgari Begam, or to one of them, portions of the property now in question. On the 17th January, 1913, there being then due to Pandit Sheo Dayal Rs. 20,000, under the mortgage of the 27th November, 1907, Hamidulla Khan, Musammat Chand Bibi and Musammat Ashgari Begum sold the 4 annas 5 pies share in Mauza Gundhia to Pandit Sheo Dayal for Rs. 21,000.

Before referring to the judgments of the trial Judge and in the Court of the Judicial Commissioner, it is advisable to mention some other matters. Niamat Ullah Khan's youngest brother was Ibrahim Khan, who died and left four sons surviving him, of whom Ehsan Ullah was the eldest. Ehsan Ullah and his three brothers on the 20th December, 1910, brought a suit against Hamid Ullah Khan, his two wives, and Mohammad Abdul Ghani Khan and Mohammad Abdul Rahman Khan, who are the plaintiffs in the present suit, and in their plaint, alleging that Munni Bibi had by a will of the 10th June, 1906, bequeathed to their father, Ibrahim Khan, Mauza Mundia Misir, the 4 annas 5 pies share in Mauza Gundhia, and the two groves, the house and *sir* land in Mauza Jalalpur, all of which are claimed by the plaintiffs appellants in the present suit, asked for a decree for possession. To that suit these plaintiffs appellants offered no defence, and on the contrary the plaintiff appellant here, Mohammad Abdul Ghani Khan, on the 4th November, 1910 wrote to Ehsan Ullah as follows :—

"Claim for possession.

"My dear Mohammad Ehsan Ulla Khan and Abdulla Khan raises of Jalalpur,

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"After affectionate greetings, I write to say that as regards the property left and possessed by my deceased sister, Munni Bibi, the wife of Niamat Ullah Khan, Taluqdar and *rais* of Jalalpur, you enquire about, I do not at all turn against the purport of her will. You can obtain the said property under the will by bringing a suit or otherwise, and I have no objection. You are quite free to take necessary steps. Abdul Rahman Khan too says the same thing. I have enquired from him also.

"With kindest regards.

"Yours affectionately,

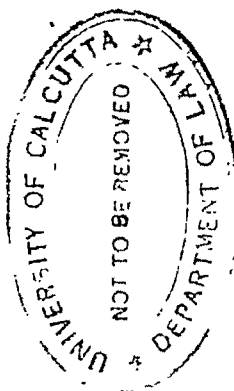
"ABDUL GHANI KHAN,

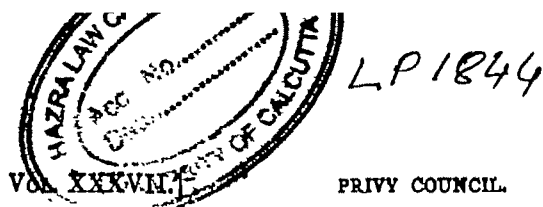
"Taluqdar of Kukra.

"Dated 4th November, 1910."

Mohammad Abdul Ghani Khan was called as a witness for the plaintiffs in the suit of 1910, and on being shown his letter of the 4th November, 1910, said: "This letter I wrote with the permission of my brother Abdul Rahman Khan, who is joint with me," and "I never thought of the matter whether I am entitled to the assets of Munni Bibi or not. I disclaim a share in the property if I am entitled to it." When Abdul Ghani Khan gave his evidence in that suit he was 42 years of age, and it appears to their Lordships impossible to believe that he and his brother had never before 1910 considered the question as to whether they as the heirs in Mohamman law of Munni Bibi had any claim to any part of the valuable property which had been hers. The plaintiffs in the suit of 1910 failed to prove the execution of the alleged will, and their suit was dismissed.

The learned Subordinate Judge, Mahmud Hasan, who tried the present suit, construed the document of the 7th March, 1884, as a will, so far as it related to the property in question here, and as a deed of gift so far as it related to the other property dealt with by it. He held that section 41 of the Transfer of Property Act, 1882, did not apply to the cases of Pandit Sheo Dayal and of the other transferees, and as he considered that it was not proved that Munni Bibi's heirs had assented to the bequest by her of the property in question, he gave the plaintiffs a decree for the possession of a two-third share of that property. It should here be mentioned that it does not appear from the record that Pandit Sheo Dayal had given evidence in this suit or that he had made any enquiry as to the title of Lutf Ullah Khan to mortgage, or the title of Hamid Ullah Khan and his mother and wife to sell the 4 annas 5 pies share in Mauza Gundhia. From that decree the defendants Musammatt





Fakhr Jahan Begam and Pandit Sheo Dayal appealed to the Court of the Judicial Commissioner. Their appeals raised the question as to the true construction of the document of the 7th March, 1884, and consequently raised the question as to the right of the plaintiffs to maintain this suit. The plaintiffs filed cross-objections.

The appeals and the cross-objections were heard by the learned Judicial Commissioners, Mr. Stuart and Mr. Kanhaiya Lal, and they delivered their very carefully considered judgments on the 19th December, 1917. Mr. Stuart held that under the Taluqdari sanad Munni Bibi was a successor within the meaning of the term "successors" in that sanad, and consequently had an absolute power to give or bequeath the Taluqdari property to whomsoever she pleased, a power of alienation which was not controlled by Mohammedan law. Mr. Kanhaiya Lal was of the contrary opinion; he rightly held that as Munni Bibi obtained her title to the Taluqdari property, not by right of inheritance under the sanad but under the will of her husband Niamat Ullah Khan, she was not a successor within the meaning of the sanad.

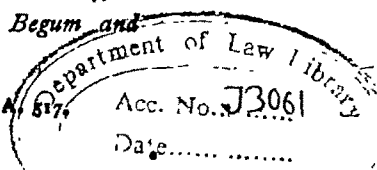
In 1921, the Board, in *Ghulam Abbas Khan and another v. Amatul Fatima and others* (1) which was an appeal from Oudh, held that the word "successors" in a similar primogeniture sanad meant those designated persons who would succeed in the event of an intestacy, and not persons who took by sale, gift or bequest. Had it not been for Niamat Ullah Khan's will the Taluqdari property would, on his death, have vested by right of inheritance under the sanad in Lutf Ullah Khan, who was the elder of his two brothers. Under the circumstances, Munni Bibi's right to dispose by gift or by will of the Taluqdari property was the right of an owner under the Mohammedan law, and was the same right which she had to dispose of the 4 annas 5 pies share in Mauza Gundhia.

The Judicial Commissioners agreed in their construction of the document of the 7th March, 1884, and held that it was, and operated as a deed of gift, and that all the property mentioned in it passed as a good and valid gift under the Sunni law to Lutf Ullah Khan. They held that Munni Bibi by that deed transferred the corpus of the property, the Taluqdari property and the 4 annas 5 pies share in Mauza Gundhia, to Lutf Ullah Khan, reserving to herself for her life the usufruct of the property in question in this suit. Apparently they based their judgments on a decision of the Board in 1867, in *Nawab Umjad Ally Khan v. Mussummat Mohumdee Begum and others* (2).

(1) (1921) L. R. 48 I. A. 135.

(2) (1867) 11 M. I. A. 517.

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It had been contended on behalf of the plaintiffs before the Judicial Commissioners that there had been no possession of this property now in question, given to or taken by Lutf Ullah Khan, and that consequently the gift was void under the Mohammedan law, but they considered that the clear intention of Munni Bibi as shown by her deed was that the title to this property should immediately vest in Lutf Ullah Khan and that she should have no right to sell, mortgage, or otherwise dispose of the property, and they found that as the usufruct was reserved for her life by Munni Bibi it was not possible for physical possession of the property in the suit to be given to Lutf Ullah Khan in Munni Bibi's lifetime. In the opinion of the Judicial Commissioners everything which was reasonably possible to make perfect the gift had been done and that nothing more was required to make the gift a good gift according to Mohammedan law. The Judicial Commissioners by the decrees of the 19th December, 1917, set aside the decree of the Subordinate Judge, and dismissed the cross-objections and the suit. From the decrees of the Judicial Commissioners these consolidated appeals have been brought.

Their Lordships will now consider whether the document of the 7th March, 1884, may be regarded, so far as the property now in question is concerned, as a Mohammedan will and if it is not a Mohammedan will, but is a deed of gift, then the question arises whether in the circumstances of this case the gift of this property to Lutf Ullah Khan became a valid gift under the Mohammedan law applicable to Sunnis.

In construing the document of the 7th March, 1884, it has to be borne in mind that in Mohammedan law the broad distinction between a gift (*hiba*) and a bequest (*wasiat*) is that in the case of a gift the immediate right of property in the subject of the gift is conferred, and in the case of a bequest the vesting of the right of property is postponed. Owing to the fact that there is in India no uniform or accurate system of conveyancing, and to the fact that deeds and wills are, in India, as a rule most inartificially drawn up, frequently by persons not possessed of legal knowledge, it is often difficult to ascertain with certainty what was precisely intended by the document, and in some cases to ascertain whether the document was intended to operate as a deed of gift or as a will. Their Lordships have, for the following reasons, come to the conclusion that the document of the 7th March, 1884, cannot be regarded in any respect as a will.

On the 7th March, 1884, Munni Bibi was, as she recited in the

document, the owner in possession of the entire property of the Ilaqa (the Taluqa of Agar Buzurg) which her husband had bequeathed to her, and she was also the owner in possession of the 4 annas 5 pies share in Mauza Gundhia; that 4 annas 5 pies share and the Taluqdari property constituted her zamindari estate. As their Lordships read the deed, Munni Bibi by it made a gift to Lutf Ullah Khan of "my movable and immovable property, all my zamindari and lambardari estate, &c." reserving to herself for her life the usufruct of the property now in question, but making it clear that by that reservation of the usufruct she did not reserve to herself any right to transfer by mortgage or sale or gift any part of the property. As their Lordships read the deed it was intended to be and to operate as an immediate and irrevocable disposition of all Munni Bibi's movable and immovable property, and all her zamindari and lambardari estate mentioned in the deed and in the schedules to it, subject to the reservation for her own use during her lifetime of the usufruct of the property in question here, and it must be construed as a deed of gift and not as a will.

The reservation of the usufruct did not by itself make the gift of the property now in question void under Mohammedan law. So far as that is concerned there is the authority of the Board in *Nawab Umjad Ally Khan v. Mussummat Mohamdee Begum and Mussumat Nawab Begum, Afzul Muhul and others* (1), for that statement as to Mohammedan law, although the parties in that case were Shias and not Sunnis. But in the Courts below and in this appeal it has been contended that the deed of the 7th March, 1884, is void so far as it purported to be a gift of the property in question in this suit on the ground that no possession was actually taken of this particular property, and no mutation of names in respect of this particular property was obtained, by Lutf Ullah Khan until Munni Bibi had died in 1906.

That contention has raised a question by no means easy of solution. The solution of that question depends upon what are the facts here and upon what is the rule of Mohammedan law applicable to those facts. In considering what is the Mohammedan law on the subject of gifts *inter vivos* their Lordships have to bear in mind that when the old and admittedly authoritative texts of Mohammedan law were promulgated there were not in the contemplation of any one any Transfer of Property Acts, any Registration Acts, any revenue Courts to record transfers of the possession of land, or any zamindari estates large or small, and that

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it could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed. The object of the Mohammedan law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee, and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift.

For a valid gift *inter vivos* under the Mohammedan law applicable in this case, three conditions are necessary, which their Lordships consider have been correctly stated thus :—“(a) Manifestation of the wish to give on the part of the donor ; (b) the acceptance of the donee, either impliedly or expressly ; and (c) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively.” (“ Mohammedan Law,” by Syed Ameer Ali, 4th ed., vol. 1, p. 41). In their Lordships’ opinion the whole zamindari property mentioned in the deed, and not parts of it only, must, for the purposes of this case, be regarded as one property, the taking possession of any part of it being constructively a taking possession of the whole. The wish of Munni Bibi to give that property to Lutf Ullah Khan and his acceptance of it on the 7th March, 1884, are clearly manifest from a perusal of the deed which he received and acted upon. The question is, did Lutf Ullah Khan actually or constructively take possession of the property in question in this suit? That he did not, until Munni Bibi’s death in 1906, take physical possession of Mauza Mundia Misir, the 4 annas 5 pies share in Gundhia or the two groves, the house and sir land in Jalalpur, or apply for mutation of names in his favour in respect of these particular properties, is admitted. On the execution of the deed of gift in 1884, Lutf Ullah Khan did obtain mutation of names in his favour of all the other zamindari property, and from the 7th March, 1884, until Munni Bibi died in 1906, he paid the Government revenue which became due in respect of the Taluqdari part of the property now in question. If Lutf Ullah Khan had received after the 7th March, 1884, and before Munni Bibi died in 1906, any of the rents or profits of the property now in question, he would be held to have received them as a trustee for Munni Bibi, although the title to the corpus of the property was in him : In their Lordships’ opinion Lutf Ullah Khan must be regarded as having been constructively in possession, although not in physical possession of the corpus of

the property now in question from 1884 until 1906, and the gift was a valid gift.

Their Lordships will accordingly humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Watkins & Hunter:—Solicitors for Appellants.

Barrow Rogers & Nevill:—Solicitors for Respondents.

K. V. L. N.

Appeal dismissed.

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Sir John Edge.

PRESENT : *Lord Atkinson, Lord Carson, Mr. Ameer Ali and Sir Lawrence Jenkins.*

K. RAMALINGA ANNAVI AND ANOTHER

v.

NARAYANA ANNAVI AND OTHERS.

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1922.

March, 7.

1921.

December, 8, 11,
12, 13, 15.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Hindu Law—Gift to daughter out of joint property—Suit for partition—Status of family—Provision for marriage expenses.

The institution of a suit for partition by a member of a joint Hindu family puts an end to its joint status : *Girja Bai v. Sadashiv Dhundiraj* (1) followed.

No provision for the marriage expenses of the members of the family can be made in the decree in a partition suit, even though such marriages take place after the institution of the suit and before the decree is passed.

Gifts to daughters by a member of a joint Hindu family out of joint property are not invalid, if they are found to be reasonable in the circumstances of the case.

Consolidated appeals from a decree of the Madras High Court varying a decree of the Subordinate Judge of Tinnevely.

Muthuswami, Ramalinga and Lakshmivaraha formed a joint Hindu family having a large money-lending business and some immovable properties in the Tinnevely District. In 1895, the brothers divided the outstandings due to the family but continued to be joint in the family worship and held the lands jointly. Lakshmivaraha made a gift of certain outstanding mortgage in favour of his daughter. First plaintiff is the son of Lakshmivaraha and plain-

(1) (1916) L. R. 43 I. A. 151 ; L. R. 43 Calc. 1031 ; 24 C. L. J. 207.

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tiffs 2 and 3 are his sons. Defendant No. 1 is the son of Krishna (a son of Ramalinga) and defendant No. 6 is Krishna's widow : defendant No. 2 is another son of Ramalinga and defendant No. 3 was his son. Defendant No. 4 is the daughter of Lakshmivara and sister of the first plaintiff. The plaintiffs instituted the present suit for partition. They claimed that the family was joint, that the gift to defendant No. 4 was invalid and that all the joint family properties should be divided equally between themselves and the members of Ramalinga's branch. They also claimed that provisions for the marriage expenses of plaintiffs 2 and 3 should be made in the decree. Defendants 1 and 6 contended that the family became completely divided in 1895, or that at least there was a complete winding up of the family money-lending business then. Defendants 2 and 3 pleaded among other things that plaintiffs 2 and 3 are not entitled to have any provision made for their marriage expenses. (The other contentions are not material to this report and are omitted).

The trial Judge held that the family was joint except in regard to the money-lending business which was completely wound up in 1895, that the gift to the fourth defendant could not be considered unreasonable in the circumstances of the case and that the provision for the marriage expenses of plaintiffs 2 and 3 could not be made.

On appeal, the High Court (Sankaran Nair and Oldfield, JJ). held that only particular items of the money-lending business were divided, that the gift to the fourth defendant was reasonable in the circumstances of the case and that the marriage expenses of the second plaintiff who was married after the institution of the suit should be provided for in the decree. From that decree varying the decree of the trial Judge, these consolidated appeals are presented by defendants 1 and 6 and by the plaintiffs. (The arguments reported here are only those relating to the questions referred to in this report.)

Sir George Lowndes K. C. and *Dube* for the Appellants in the first appeal argued that there was a complete severance of the joint family relationship in 1895 and referred to the evidence. In the alternative they contended that it is established on the evidence that there was a complete winding up of the family money-lending business.

Dunne K. C. and *Kenworthy Brown* for the Appellants in the second appeal : The gifts to the fourth defendant are invalid. A member of a joint family cannot deal with the corpus of the joint property : he can only make gifts out of the income : *Bachoo v.*

v. Mankorebai (1) : (on appeal) *Hurkisondas v. Mankorebai* (2) ; *Churaman Sahu v. Gopi Sahu* (3) is distinguishable. There the gift was by a widow who had no coparceners : *Srinivasa v. Thiruvengadathaiyangar* (4) followed in *Gopalam v. Venkataraghavulu* (5) is clear authority that the marriage expenses of plaintiffs 2 and 3 should have been provided for. The High Court was wrong in declining to follow that decision.

De Gruyther K. C. and *Narasimham* for the Second Defendant admitted the validity of the gifts to the fourth defendant. They argued that the joint status of the family was determined as soon as the first plaintiff sent a notice to the other members of the family in July, 1909 : at least it was determined by the institution of this suit : *Girja Bai v. Sadashiv* (6). After the breaking up of the family, each member is entitled to his share as on the date of the breaking up and other members cannot be called upon to contribute for the expenses of any one member. In *Srinivasa v. Thiruvengadathaiyangar* (4). Sadasiva Ayyar, J. held that marriage was not an obligatory *samskara* in the case of males : Sundara Ayyar, J. held the other view. Spencer J. to whom a reference was made upheld the allowance for marriage expenses, as being more in accordance with modern conditions rather than strict Hindu law. This view was adopted in *Gopalam v. Venkataraghavulu* (5) as being in accordance with the practice in Madras. The view taken by Sadasiva Ayyar J. in *Srinivasa v. Thiruvengada* (4) is the correct view according to Hindu law. *Kameswara Sastri v. Veerachariu* (7) is distinguishable. There the question was as to money borrowed for the marriage expenses of a member and the binding nature of such a debt. It was not a case of expenses for a prospective marriage.

Parikh for the Fourth Defendant was not called upon.

Lowndes K. C. replied.

C. A. V.

The judgment of their Lordships was delivered by

Mr. Ameer Ali : These two consolidated appeals from a decree of the High Court of Madras arise out of a suit which was brought

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(1) (1904) I. L. R. 29 Bom. 51.

(2) (1907) L. R. 34 I. A. 107 ; I. L. R. 31 Bom. 373 ; 5 C. L. J. 1.

(3) (1909) I. L. R. 37 Calc. 1 ; 10 C. L. J. 545.

(4) (1912-14) I. L. R. 38 Mad. 556.

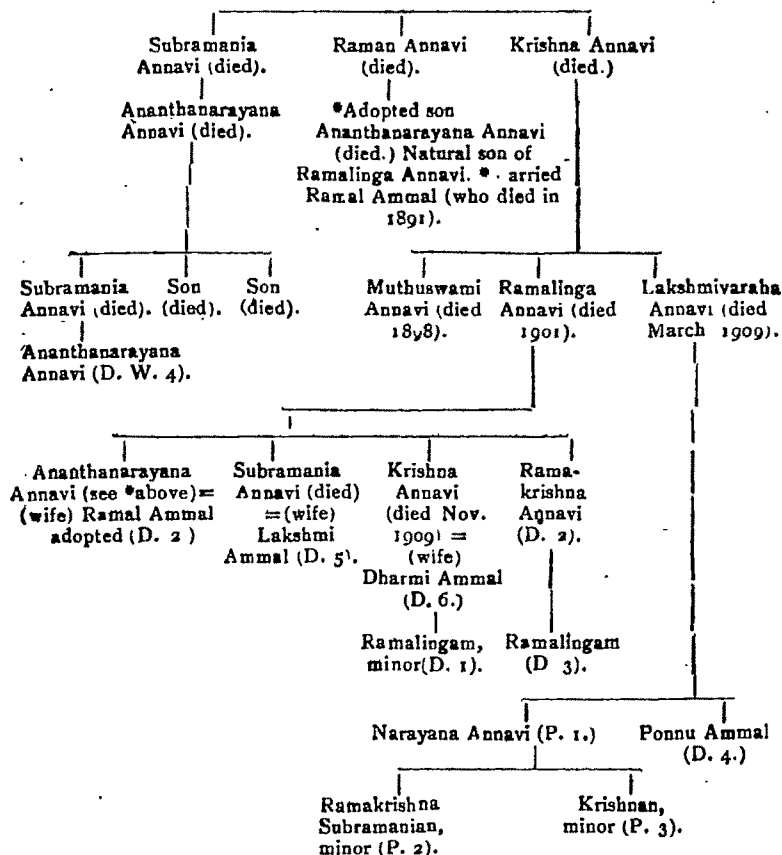
(5) (1915) I. L. R. 40 Mad. 632.

(6) (1916) L. R. 43 I. A. 151 ; I. L. R. 43 Calc. 1031 ; 24 C. L. J. 207.

(7) (1909-10) I. L. R. 34 Mad. 422.

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by the plaintiffs in the Court of the Subordinate Judge of Tinnevely on the 31st January, 1910, for a decree for partition in respect of certain movable and immovable properties together with out-standings of a money-lending business on the allegation that they and the defendants 1, 2 and 3 formed members of a joint undivided Mitakshara family. The following pedigree will explain the relative positions of the parties and their respective contentions.



(The judgment proceeded at great length referring to the evidence. Their Lordships agreed with the conclusions of the Subordinate Judge in regard to the transactions of 1895 and disagreed with the view of the High Court. This portion of the judgment is omitted as being unnecessary for this report)

There remain now the two questions, one relating to the validity of the two gifts made by Lakshmivaraha to the fourth defendant, Ponnu Ammal. The first is an assignment of Rs. 5,000 out of the money which fell to the share of Lakshmivaraha due from the Thiruvavuduthurai Mutt. This was done at the instance of Lakshmi-

varaha. The other is an assignment of a usufructuary mortgage held by him. In the aggregate the two sums amount to Rs. 8,000. The father has undoubtedly the power under the Hindu law of making, within reasonable limits, gifts of moveable property to a daughter. In one case the Board upheld the gift of a small share of immovable property on the ground that it was not shown to be unreasonable. In the present case, the gifts relate to sums of money. The only question is whether they were reasonable. Both the Courts in India have answered the question in the affirmative and their Lordships have no materials or ground to hold otherwise.

Regarding the prayer for the allotment upon partition of Rs. 2,000 for the marriages of plaintiffs 2 and 3, the High Court disallowed the claim in respect of the prospective marriage, but allowed it for the expenses of the marriage that took place before the decree in the first Court, on the ground that the joint family status was not dissevered until the decree for partition, and that the joint family liability continued until then. This view is opposed to the law laid down in the case of *Girja Bai v. Sadashiv Dhundiraj* (1), where it was held expressly, that under the law of the Mitakshara, to which the parties in the present case are subject, an unambiguous and definite intimation of intention on the part of one member of the family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which, until then, he had held in jointness. This intention was clearly intimated to the co-parceners when the plaintiff Narayana served on them the notice Ex. II. on the 30th of July, 1909. That notice effected a separation so far as his branch of the family was concerned, and no obligation rested on the joint family in respect of his sons' marriages. The decree of the Subordinate Judge dismissing the claim was therefore correct.

As regards the properties in schedules XI and XIII, there are not sufficient materials before their Lordships to determine whether they belonged to the joint family or formed the exclusive property of the plaintiffs. It will be for the first Court to decide the question upon proper materials when giving effect to the decree for partition. But the parties would be well advised to settle it amicably.

It is admitted that the land allotted to the widow of Subramania Annavi (defendant No. 5), on her decease, became divisible among the heirs of her husband, in other words the male members of the family parties to this action. To this extent the declaration made by the Subordinate Judge will be varied.

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The High Court directed in its discretion that each party should bear his own costs. With that direction their Lordships do not propose to interfere. But having regard to the nature of the contentions, they consider that the plaintiffs must pay the costs of defendants 1, 6 and 4. The defendants 1 and 6, who alone impugned the right of defendant No. 2 to a share in the joint family properties, must pay his costs. The plaintiffs' cross-appeal will be dismissed with costs.

Their Lordships will accordingly humbly advise His Majesty to set aside the decree of the High Court and restore the decree of the Subordinate Judge, subject to the above variation, with the above directions as to costs.

Chapman, Walker & Shephard: Solicitors for Defendants 1 & 6 Appellants.

Barrow, Rogers & Nevill: Solicitors for Plaintiffs Appellants.

Douglas Grant: Solicitor for 2nd Defendant Respondent.

E. Dalgado: Solicitor for 4th Defendant Respondent.

K. V. L. N.

Decree modified.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis William Maclean, Knight, Chief Justice, Mr. Justice Harington, and Mr. Justice Fletcher.

TRIGUNA SUNDARI DASÍ

v.

RADHARANI DASÍ.*

CIVIL.

1909.

January, 7.

Maintenance—Will—Waiver—Election—Shobait, de facto—Expenses incurred—Voluntary payment.

N, the husband of the plaintiff, died on the 22nd February, 1891, possessed of very considerable property, and by his will, dated the 5th April, 1889, after giving certain legacies, bequeathed two houses to the use of his wife for life. (The testator had in his lifetime disposed of one of the two houses. The other house was soon after the grant of probate made over to the plaintiff by the executors and she was in receipt of the rents and profits). The residue of his pro-

*Appeal from Original Civil No. 27 of 1908, against the decision of Mr. Justice Chitty, dated the 19th March, 1908.

perty was vested in trustees upon trust to pay his widow an annuity of Rs. 100, which she was to have in addition to her life estate in the houses; and, she was to be allowed to occupy suitable rooms in the family dwelling house; and, the trustees were further to allow her Rs. 5,000, should she desire to proceed on pilgrimage. There has been since the death of the testator and up to the 14th August, 1905, when practically the litigation ceased, a litigation in respect of the administration of his estate. In that administration suit the present plaintiff raised the question that she was entitled to a widow's maintenance out of the estate, but the learned Judge left the matter open. The present suit was instituted on the 21st May, 1906, claiming maintenance out of the estate of her late husband:

Held, that *prima facie* a widow being entitled to maintenance out of her husband's estate, the plaintiff, in the events that occurred, did not waive her right to that maintenance.

That there was no election by her, as there was nothing to show that she ever knew or was ever informed of what her rights were. She could not elect until she was fully made aware of what her rights were under the law. She was not called upon by the parties interested under the will in the estate or by anybody else to elect: *Sopwith v. Maughan* (1) followed.

That as she was a Hindu widow and a *pardanashin* lady, she was entitled to special protection.

By an agreement dated the 4th February 1889 and made between N and his mother R in settlement of differences which had arisen between them, it was agreed that the daily and yearly worship of two idols be performed by and the management and care thereof should be entrusted to R for whose use in such worship one or two rooms shall (if required) be set apart and the Babaji or Baistab employed for the services of the said idols should be under the control and act under the directions of the said R. ... Many years afterwards, and, by an agreement, the plaintiff carried on this worship. In respect of that worship she incurred certain expenses:

Held, that the plaintiff was not a *shabait* of the idols, and could not recover the money spent by her, the payment being a voluntary one.

Appeal by the Plaintiff.

Suit for maintenance and for a declaration that a provision might be made for certain expenses incurred by her in the worship of idols, out of the testator's estate.

The material facts appear from the following judgment of

Chitty J.—The facts of this are not in dispute. The plaintiff is Srimatty Triguna Sundary Dassi widow of one Nanda Lal Mallik. The original first defendant was Prem Lal Mallik the adopted son of Nanda Lal Mallik. The second defendant is father-in-law of Prem Lal Mallik and sole trustee under an indenture of settlement dated the 2nd October 1905, by which Prem Lal Mallik settled all his property upon certain trusts. Prem Lal Mallik died on the

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20th March 1907, and the present 1st defendant Sreemati Radharani Dassi, his widow and sole heiress, was brought upon the records as his legal representative.

Nanda Lal Mallik was possessed of considerable property movable and immovable. By his will dated the 5th April 1889 after giving certain legacies and reciting the adoption of Prem Lal Mallik, Nanda Lal Mallik bequeathed two houses 128 and 152 Balaram Dey's Street to the use of his wife, the plaintiff, for her life. The remainder of his property he bequeathed to trustees in trust to pay the plaintiff an annuity of Rs. 100 in addition of her life estate in the two houses aforesaid and also to allow her to occupy suitable rooms in the family house No. 84 Upper Chitpur Road; to pay Kristo Chander Chatterjee an annuity of Rs. 10 per mensem, to perform certain debtshebas; to keep in repair certain houses and premises; and to pay Rs. 10.00 per mensem for keeping up and maintaining the establishment at 84 Upper Chitpur Road. The trustees were further to pay to the plaintiff Rs. 5000 should she desire to proceed on a pilgrimage. Upon Prem Lal Mallik attaining his majority the entire property was to go to him absolutely subject to the life estate of the plaintiff in the two houses, her annuity of Rs. 100 a month, and her right of residence at 84 Upper Chitpur Road. In case of Prem Lal Mallik's decease before attaining majority provision was made for the adoption by the plaintiff of another son. If she neglected or refused so to adopt she was only to receive for her maintenance and support the said annuity, her life estate in the two houses, and her right of residence in the family house and no other benefit whatever under the will.

Nanda Lal Mallik died on the 22nd February 1891 leaving the plaintiff, his son Prem Lal Mallik and his mother Srimati Rajrani Dassi him surviving. The executor in due course obtained probate of the will. The testator had in his life time disposed of one of the two houses left to the plaintiff viz, 128 Balaram Dey's Street. The other house was soon after the grant of probate made over to the plaintiff by the executors and she has ever since been in receipt of the rents and profits.

By an agreement dated 4th February 1889 and made between Nanda Lal Mallik and his mother Srimatty Rajrani Dassi in settlement of differences which had arisen between them it was (*inter alia*) agreed (C 13) that the daily and yearly worship of the idols Radhakantajee and Singabahini Devi shall be performed by, and the management and care thereof shall be entrusted to the said Rajrani Dassi for whose use in such worship one or two rooms shall (if

required) be set apart and the Babaji or Baistab employed for the services of the said idols shall be under the control and act under the directions of the said Rajrani Dassi who is to have full power to dismiss them and she shall thereupon immediately employ other proper persons in their place and the brass and copper utensils also gold and silver ornaments and jewels used for the worship of the said idols shall be delivered to her and remain under her control.

Rajrani Dasi filed two suits 394 of 1892 and 382 of 1893.

On the 14th August 1893 the executors made over the estate of Nanda Lal Mallik to the Administrator-General and he was made a party to those suits.

The plaintiff then as next friend of Prem Lal Mallick filed suit No. 596 of 1893 for administration of the estate of her late husband and other relief. That suit was eventually dismissed. On the 11th May 1896 the plaintiff as next friend of Prem Lal Mallick filed another suit, 365 of 1896, against the Administrator-General asking that he be removed from his office as executor and trustee and the estate administered by the Court. In that suit the usual preliminary administration decree was made on the 25th August 1896.

On the 4th January 1900 suits 594 of 1892 and 382 of 1893 were amicably settled and a consent decree passed. By clause 2 of the terms of settlement the agreement of the 4th February 1889 was to be set aside so far as para. 3 and certain other paras. were concerned and held not to be binding on Rajrani Dassi or Triguna Sundari Dassi or either of them.

Clause 5 was as follows :—

“ Srimati Rajrani Dassi having already made over to Srimati Triguna Sundary Dassi the daily and periodical worship of the Thakur Radhakantjee and possession of the Thakur's room and certain articles of gold ornaments and silver and other utensils and furniture of the Thakur mentioned in Schedule A hereto as and from the 1st day of Pous last she will also make over to Srimati Triguna Sundary Dassi the remainder of the jewellery and ornaments belonging to the said Thakur Radhakantaji and Singhabahini Thakurani which are now in the hands, possession or control of her Rajrani Dassi.”

On the 6th July 1903 Prem Lal Mullick was married. On the 19th November 1904 he attained his majority. It should be stated that owing to the income of the estate being insufficient to monthly sum of Rs. 1000 directed by the will to be spent on the upkeep of the family house and establishment had been reduced to Rs. 500 by

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an order of the Court on the 25th August 1896 in the administration suit.

On the 17th April 1905 the plaintiff as next friend of Prem Lal Mullick in suit 365 of 1896 was discharged.

On the 14th August 1905 the final decree in the administration suit was passed. The plaintiff had applied in that suit for additional maintenance but Sale J. considered that that question could not be determined there and that the plaintiff should file a separate suit.

On the 31st August 1905 it was ordered that the Administrator-General should make over the estate to Prem Lal Mullick.

On the 2nd October 1905 Prem Lal Mullick made the deed of settlement above referred to whereby he conveyed all his property to the defendant No. 2 on certain trusts.

Prem Lal Mullick subsequently sued to have that deed set aside, but during the pendency of the suit he died and it therefore abated.

On the 21st May, 1906, an order was made in suit 365 of 1896 charging Rajrani Dasi's annuity of Rs. 200 and the plaintiff's annuity of Rs. 1,00 on certain premises No. 21 Strand Road.

On the 2nd August 1906 the Administrator-General made over the whole estate to the defendant No. 2 as trustee under the deed of settlement.

The plaintiff now sues for maintenance in addition to the said annuity of Rs. 100 and prays that sufficient property belonging to the estate may be charged with payment of such additional maintenance. She further prays for a declaration that she is entitled during her lifetime to carry on and perform the daily and periodical Sheba of the said Thakurs, and asks that a scheme may be framed as to that.

The third branch of her claim viz. that provision be made for the repairs of her portion of the family dwelling house was not mentioned in the arguments before me.

First as to the plaintiff's claim to additional maintenance some attempt was made by her counsel to argue that there was no provision in the will of Nanda Lal Mullick for the plaintiff's maintenance. It was said that the annuity of Rs. 1,00 was simply pocket money and that she was entitled to maintenance besides. I do not so read the will. It is I think clear that the testator considered that the annuity plus the life estate in the two houses should be the provision for his wife's maintenance and support. Indeed in what has been called the penalty clause in the event of her failing to adopt a son, it is expressly so stated. She was, it is true, to participate in and benefit by the monthly allowance of Rs. 1,000 but that was

only during the son's minority. I take it, then, that the testator has made provision for his wife's maintenance. The question is whether she can now disregard that provision and claim maintenance *dehors* the will. For the defendants it was contended that it was clear case of election. No doubt part XXVII of the Indian Succession Act applies to Hindu wills by virtue of Act XXI of 1870. But here the circumstances necessary before the plaintiff could be put to her election are wanting. It has been held that the claim of a widow to maintenance is not a charge upon the estate of her deceased husband until it is determined and so charged by decree or agreement or at least it is in process of being so determined. Nanda Lal Mullick had therefore an absolute right to dispose of his estate as he did, and he certainly did not dispose of any thing belonging to the plaintiff (see Succession Act. section 167). The case therefore of *Pramada Dasi v. Lakhi Narain Mitter* (1), relied upon by the defendant's counsel is not directly in point.

At the same time it appears to me quite inequitable that the plaintiff should now after the event which has happened be allowed to put forward such a claim; she was content for 14 years to receive this annuity and the rents of the house without a suggestion that she was entitled to any thing more. She has always accepted and in para. 3 of her present plaint she now accepts the will in its entirety and does not profess to quarrel with the testator's dispositions. She participated in the monthly allowance of Rs. 1000 and later Rs. 500. She received and spent the Rs. 500 for her pilgrimage. She has brought two suits for the administration of the estate. This is the fifth suit relating to it, to which she has been a party. She has allowed the whole estate to be administered and to pass into the hands of the beneficiaries. She has obtained an order charging her annuity upon a portion of her husband's estate. The rights of third parties have now intervened. I do not think that she can now be permitted to give the go by to all that has been done and to put forward a claim against the estate, which she has by her conduct long since impliedly waived.

Then I came to the question of the sheba. The following additional facts should be borne in mind. It is conceded by both sides that of the deities mentioned in the will of Nanda Lal Mullick we are now only concerned with Sri Radhakantjee. On the death of Prem Lal Mallick and the consequent failure of the male line in this branch the sheba of the three last mentioned idols passed to another branch of the family. As to Sri Radhakantjee this sheba

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is now with one Harend a Kristo Seal, who represents another branch of the descendants of Rup Lal Mullick, great-grand-father of Nanda Lal Mallick. It is admitted that since Jaistha last (nearly a year) the plaintiff has been out of possession. In the worship of Sri Radhakantjee Nanda Lal Mallick seems at most to have had a *pala* as shebait. As I read the agreement of the 4th February 1889 clause 3 would at most operate as an assignment of his right of shebaitship to Srimati Rajrani Dasi. Such assignment would be operative only to the extent of Nanda Lal's interest i. e. for his life. The provision in his will for the upkeep of the sheba of the deities there mentioned could not affect the question of the succession to the shebaitship which he has no power to devise. The provision however as I read the will was only a temporary one, namely until the adopted son attained majority. We come then to the consent decree of the 4th January 1900, by which Srimati Rajrani Dasi is said to have transferred her right of shebaitship to the plaintiff. By clause 1 of the terms of settlement the agreement of the 4th February 1889 was to be regarded as cancelled, clause 5 merely recites that Srimati Rajrani Dasi had already made over to the present plaintiff the daily and periodical worship of the Thakur with the room and certain articles and contained an arrangement for the delivery of possession of certain other things. There is no evidence of when or how the shebaitship was so made over, but after the death of Nanda Lal in 1891 it was not Rajrani Dasee's to transfer. Nanda Lal's right in the shebaitship would pass by inheritance and if it is now vested in any of the parties it would be in Srimati Radharani Dasi, the widow of Prem Lal.

Some argument was addressed to me as to the right of the plaintiff in any event to be recouped the moneys which she had in fact spent in connection with the sheba. It was not made clear who was to make good this amount, or from what property it was to be recovered. This claim however does not form any part of the prayer of the plaint and I need not further consider it. I may however remark that I cannot see how any such claim could be substantiated on the materials which I have before me.

On the whole I am of opinion that the plaintiff has no case in respect of either branch of her claim. The suit is accordingly dismissed with costs on scale No. 2.

Against this decree, the plaintiff appealed.

Messrs. B. Chuckerbutty, B. C. Mitter and Lahiri for the Appel-

Messrs Knight and S. R. Dass for the Respondent.

The judgments of the Court were as follows :

Maclein C. J.—This is an appeal from Mr. Justice Chitty in a suit in which the plaintiff claims maintenance out of the estate of her late husband, and also claims certain relief in respect of the worship of certain idol.

The facts of the case lie within a comparatively narrow compass, and they are these :—Nanda Lal Mullik the husband of the present plaintiff, died possessed of very considerable property and by his will dated the 5th April 1889, after giving certain legacies which are immaterial for the present purpose he bequeathed two houses, Nos. 128 and 152 Ballaram Dey's Street in Calcutta to the use of his wife for life. He vested the residue of his property in trustees upon trust to pay his widow an annuity of Rs. 100 which she was to have in addition to her life-estate in the two houses I have mentioned; and, she was to be allowed to occupy suitable rooms in the family dwelling house in Upper Chitpur Road: and, the trustees were further to allow her Rs. 5000, should she desire to proceed on pilgrimage. Nanda Lal Mullik died on the 22nd of February 1891; and, there has been since that date and up to the 14th of August 1905 when practically the litigation ceased, a litigation in respect of the administration of his estate. As regards that litigation it is perhaps sufficient to state that on the 11th day of May 1896, the plaintiff, as the next friend of the adopted son Prem Lal Mullik instituted an administration suit for the administration of the estate of Nanda Lal Mullik, and a preliminary administration decree was made on the 25th of August 1896. The suits seem to have proceeded in a somewhat leisurely fashion for nearly ten years and the final decree in the administration suit was made on the 14th of August 1905. That was made by Mr. Justice Sale, and, in that administration suit the present plaintiff raised the question that she was entitled to a widow's maintenance out of the estate. The learned Judge seems to have thought that he could not properly deal with that question in that administration suit. I express no opinion as to whether that view was correct or not. He says this :—"Here again" (i e. as regards this claim for maintenance) "the applicant's claim is perfectly reasonable and one that the Court would be disposed to allow" and, then he gives his reasons for not being able to go into that question in that suit. But he also says, "nothing that I say prejudices her claim in this respect." It is perfectly true, as was observed by Mr. Dunne that the question of the right to maintenance was not argued in that suit. That, as I

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have said, was on the 14th of August 1905 and, shortly after, the lady instituted the present suit on the 21st of May 1906.

Now, two questions and two questions only have been argued before us; The first—and that is the more important one—is whether the plaintiff is entitled to maintenance out of the estate; and, the second is, what is her position in relation to the idol to which I have referred.

Now, in dealing with the first point, it may be taken as well established that *prima facie* as the widow of her late husband Nanda Lal Mullik, she is entitled to maintenance out of his estate. The question is whether she has lost that right, and if she has lost that right how she has lost it. The learned Judge who decided the case seems to have thought that she by her conduct has waived her right to maintenance out of the estate. But the learned counsel who appeared in support of the judgment told us that he did not propose to support the judgment upon that ground. Having regard to what has been done in respect of the payment made to the plaintiff under the will pending the suit for administration, I may say at once that I can see nothing in the events that have occurred to justify the Court in saying that the plaintiff has waived her right to maintenance, which in the first instance she was undoubtedly entitled to.

Then it is said that although the learned Judge treated the case as one of 'waiver' he meant to treat it as one of 'election,' not election within the meaning of section 167 of the Indian Succession Act, but election in the sense of an acceptance of the benefits under the will, instead of relying upon her legal rights in respect of maintenance as a Hindu widow. In the first place, no such case of election is set up. If we look at the last paragraph but one of the written statement, there is no suggestion that she made any election. Then upon the facts of the case there is nothing to show that the plaintiff ever knew or was ever informed of what her rights were:—She is a Hindu widow a *pardanashin* lady and entitled to special protection and she could not elect until she was fully made aware of what her rights were under the law. I, therefore, think that the case of the respondents fails, whether the case be one of waiver or whether it be one of election of the class to which I have referred. Upon the question of election, I may perhaps shortly refer to an English case, *Sopwith v. Maughan* (1), which, I think expresses the principle which I

have just stated. The plaintiff was not called upon either on behalf of the adopted son Prem Lal Mullik who was interested in the estate as the next heir or by any body else to elect; and, there was no election by her.

It seems to me, therefore, with all due respect to Mr. Justice Chitty that the view taken by him on this point is not correct.

I now pass to the question of the idol. The position of the plaintiff as regards the idol seems to me rather a difficult one. It is apparent that in point of law she is not a *shebait* of the idol, and therefore she is not entitled to interfere in the worship. It appears that there was some arrangement come to between Nanda Lal and his mother Srimati Rajrani Dasi as to the worship of this idol which held good no doubt during the life of Nanda Lal who was the shebait. He died and his heir was Prem Lal Mallik. He was a minor and did not come of age until 1904. Many years afterwards, and, by an arrangement, the plaintiff seems to have carried on this worship. She says that in respect of that worship she has incurred certain expenses, and she asks at the bar that provision might be made for these expenses out of the testator's estate. What she says about that appears in paragraph 15 of the plaint—she tells us what the expenses were: but there is no statement that these expenses were incurred at the instance of the guardian of the minor during his minority or there was any request by him, if there were any guardian, that she should pay these expenses, and she does not in her plaint ask for payment of these expenses to her. It appears to have been a purely voluntary payment. In these circumstances I do not see how she can properly recover them. The claim of the plaintiff in respect of the idol must, in my opinion, fail.

The result, therefore, is that the decree of Mr. Justice Chitty so far as it dismisses the suit with costs must be reversed and an enquiry by the Registrar must be directed to ascertain what would be the proper and suitable allowance for the maintenance of the plaintiff. The decree so far as it relates to the idol must stand.

As regards the costs, either party has partially succeeded and partially failed but so far as I can appreciate, the real struggle in this suit was as to the right of maintenance. I think the proper order to make will be that each party will pay their own costs in the Court of first instance, but that the appellant will get the costs of this appeal.

Harington J. :—I agree.

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Fletcher J. :—I also agree.

G. C. Chunder & Co. : Attorney for the Plaintiff.

Pugh & Co. : Attorney for the Defendant.

A. T. M.

Appeal allowed in part.

CRIMINAL REFERENCE.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and
Mr Justice Chotzner.*

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EMPEROR

v.

SRISTIDHAR MAZUMDAR.*

Reference—Criminal Procedure Code (Act V of 1898), Sec. 307 (3)—Opinion of the Sessions Judge in his letter of reference inconsistent with that expressed in his summing up—Verdict of jury upheld.

On the statements made by the deceased to the various witnesses, and in his deposition, there was a grave case against the accused. As regards the evidence which related to the finding of the knife and the ownership of it, the opinion of the Judge expressed in his letter of reference was inconsistent with that expressed to the jury in his summing up. Owing to the direction to the jury, the latter had reason to come to the conclusion that as regards the ownership of the knife and as regards the alleged finding of the knife, they could not rely upon the evidence for the prosecution :

Held, that the jury were Judges of the facts, and having regard to the direction of the Judge as regards the ownership of the knife and the finding of it, the High Court held that the jury were entitled to take the view that it would not be safe to convict the accused, and upheld the verdict of the majority of the jury.

Reference under section 307 of the Code of Criminal Procedure.

The accused was charged under sections 302 and 326 of the Indian Penal Code. The verdict of the majority of the jury was that the accused was not guilty of the charges framed against him. The learned Sessions Judge disagreeing with this verdict referred the case to the High Court.

* Criminal Reference No. 57 of 1922 by A. De. C. Williams Esq., Officiating Sessions Judge of Birbhum, dated the 1st July, 1922.

Babus Dasarathi Sanyal, Lalit Mohan Sanyal and Gopendra Krishna Banerjee for the Accused.

Mr. Orr. for the Crown.

The following judgments were delivered :

Sanderson C. J. This is a Reference by the learned Sessions Judge of Birbhum in a case in which the accused Sristidhar Mazumdar was charged with murder and with a minor offence. The accused is a youth whose age is said to be somewhere between 15 and 17 years.

The main allegations on behalf of the prosecution were that the accused and the deceased Umapada were attending a school at Bolpur, that they both lived in the house of a pleader at Bolpur, that they occupied the same room, that on the morning of the occurrence between 10 and 11 o'clock they were seen preparing themselves for bathing and that later in the day the deceased boy was found by a woman sometime about two o'clock lying in an irrigation pit near a tank which was about half a mile away from the place where the boys were lodging—half of his body was covered in the mud—he was wounded and he had apparently having lost a considerable amount of blood. It was alleged that he stated that the accused was the person who had inflicted the wounds upon him and that he made that statement in the first instance to the woman, who found him, and then to four men, who were brought by the same woman to the place where the deceased was lying, and to several responsible and reliable persons who were brought to the place afterwards upon an alarm being raised in Bolpur—One of whom was the President of the Union Board, another was the Secretary and two others were pleaders. In addition to this, his deposition was taken by an Honorary Magistrate in the afternoon of the same day after he was taken to the Hospital. The evidence is that he was conscious at the time although he could speak only faintly. To all those persons he made the same statement viz., that the accused was the person who had committed the assault upon him.

The other part of the case was that the accused had made a certain statement and the result was that the Sub-Inspector of Police and other persons, after searching the room of the accused, went to the tank and then the accused threw a clod of earth into the tank for the purpose of indicating the place where he had thrown something, that a search was made and a knife of a peculiar shape was found in the tank. Two witnesses were called to prove that this knife belonged to the accused person. The jury by a majority of

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four to one were in favour of an acquittal on both the charges. The learned Judge did not accept their verdict and referred the case to the High Court under section 307 of the Code of Criminal Procedure.

The question is what course are we to adopt upon this Reference. Under section 307 Sub-section (3) of the Code of Criminal Procedure, we have all the powers which this Court may exercise on an appeal, and subject thereto, this Court shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it.

As regards the first part of the case, namely, the statements, which the deceased is alleged to have made to the various witnesses, and in his deposition, in my judgment, it may be said that there is a grave case against the accused. I find it exceedingly difficult to believe that the deceased would have made those statements against the accused unless they were true; that the statements were made by the deceased is proved beyond all doubt, by some of the witnesses whose testimony cannot be impeached. This Court however is placed in a difficult position by reason of the other part of the case, and the evidence which relates to the finding of the knife and the ownership of it. As regards the finding of the knife, the learned Judge in his long and careful direction to the jury, amongst other things, said this: "If it was found, the fact that the accused indicated the point where it was found is suspicious." From this I gather that the learned Judge meant that as the accused had all along been protesting his innocence it was a curious thing that the accused should have taken the Sub-Inspector and other persons to the tank and pointed out the place where he had concealed the knife in the tank. Again the learned Judge said "On the other hand you may believe the knife was not found. There are contradictions in the evidence as to the extent of the water, as to the place where the knife was found. Contradictions as to the size of the water to my mind suggest, not only that the knife was not found, but that the witnesses had never seen that tank at all; unless you believe them to be due to ignorance or incorrect estimation."

That is a strong direction to give to the jury; and I agreed with the learned counsel for the Crown when he said that it was not surprising after such a direction, that four of the jurors should have come to the conclusion that they could not convict the accused

of the offences with which he had been charged. If we had before us no more than what appears in the learned Judge's summing up to the jury, I should have been inclined to think that the learned Judge was of opinion that that part of the prosecution case was not to be relied upon. But the learned Judge in his letter of reference distinctly says that he considered it to be proved beyond all reasonable doubt that the accused was known to possess a knife of peculiar shape and that he gave information which led to the actual discovery, a few hours after the crime, of such a knife concealed on the scene of the crime. That opinion seems to me to be, with great respect to the learned Judge, inconsistent with the opinion, which he had expressed to the jury in his summing up and to which I have referred. But the matter does not rest there. On the question as to whether this knife belonged to the accused person, the learned Judge in his summing up was perhaps more severe in his strictness upon the prosecution evidence. On this part of the case the learned Judge dealt with the evidence of two witnesses,—one was a betel-nut-seller whose name is Khanda Bairagi, and the other a cultivator whose name is Tarak Nath Das. As regards the evidence of the betel-nut seller, the learned Judge said, "The betel-seller's evidence is very unsatisfactory as you must realise." The learned Judge then proceeded to give his reasons why he thought the betel-seller's evidence was unsatisfactory. As regards the evidence of Tarak, the learned Judge, after dealing with the evidence of the betel-seller, remarked as follows:—

"However, it is entirely for you to decide whether you believe the evidence of this witness or not. Further, if you disbelieve it, you are to decide whether you believe the evidence of Tarak about the knife which does not contain quite such outrageous contradictions"—implying thereby that Tarak's evidence did contain contradictions but that they were not quite so outrageous as those contained in the evidence of the betel-seller.

In view of these criticisms and the direction to the jury upon this part of the case, it seems to me that the jury may well have come to the conclusion that as regards the ownership of the knife and as regards the alleged finding of the knife in the tank, they could not rely upon the evidence for the prosecution. If the jury were of that opinion, I cannot say that it was an unreasonable view to take. It must be further noted that the learned Judge, in his letter of reference to this Court, said: "I do believe that witnesses have to some extent been tutored to make a consistent story; but I am convinced to my own satisfaction that the original story they

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had to tell was true, and that the embellishments which led to minor contradictions do not vitiate it."

The learned Judge may be right. But the jury were the judges of the facts, and having regard to the direction of the learned Judge as regards the ownership of the knife and the finding of it, in my judgment, it is impossible for this Court to hold that the jury were not entitled to take the view that it would not be safe to convict the accused, and to overrule the verdict of the majority of the jury.

For these reasons, in my judgment, this Reference should not be accepted.

We therefore direct that the accused be discharged from custody.

Chotzner J.—I agree.

A. T. M.

Accused acquitted : Reference rejected.

Before Mr. Justice Walmsley and Mr. Justice Suhrawardy.

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KING-EMPEROR

v.

HARI DAS MITRA AND ANOTHER.*

Committing Magistrate, duty of—Reference—Minor charge—Acceptance of jury's verdict as to graver charges—Charge under section 332 of the Indian Penal Code (Act XLV of 1860.)

When a prosecution is started before a Magistrate on charges exclusively triable by a Court of Session, and there is some evidence to support such charges, it is not obligatory on the Magistrate to commit the accused to the Court of sessions in all cases. He should exercise his discretion and see the facts in true proportion and decide whether or not he should try the case himself.

It is not always true that a Judge having accepted the jury's findings on graver charges, cannot make a reference with the object of having some of the accused convicted on a minor charge under section 332 of the Indian Penal Code.

Reference under section 307 of the Code of Criminal Procedure.

Charges under sections 147, 380, 365 and 332 Indian Penal Code.

The material facts appear from the judgment.

Babus Dasarathi Sanyal and Hira Lal Chuckerbutty for the Accused.

Mr. Orr for the Crown.

The judgments of the Court were as follows :

Walmsley J.—This case has been referred under section 307, Criminal Procedure Code by the Sessions Judge of Khulna.

* Criminal Reference No. 47 of 1922.

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The story told by the prosecution is as follows:—Two young Brahmin women Jibantara, the wife of Khetra Nath Bhattacharjee, and Probbabati, a widow, eloped with their lovers, hired a boat and after a week's travelling came to Bajna Bazar. The people of Bajna Bazar guessed what had happened, and thought it their duty to interfere, and they made arrangements for keeping the women their lovers, and the women's ornaments until some relative could come and assume charge. The arrangement was that the women and their lovers were taken to the house of Surendra Nath Mondal, the Panchayet, the ornaments were deposited with a shop-keeper named Keshab Chandra Saha and a man named Bijay started to convey information to Jibantara's husband. All these facts are admitted, and in regard to the motive of the Bazar people, the learned Judge has rejected the police theory that they were seeking unlawful advantages for themselves.

During the night one of the lovers complained that some money had been stolen from him: the evidence is very unsatisfactory, but the allegation was a good pretext for a chaukidar to go to the thana and in the afternoon Sub-Inspector Bipro Das Chakravarty arrived on the scene in a boat. He went first to Surendra's house and then took the women and their boat to Bajna Bazar. Arrived at the Bazar the Sub-Inspector was urgent in demanding the ornaments. His version is that the very existence of the ornaments was denied, but the defence story that Keshab wanted all the witnesses to the deposit to be present at the return, and also wanted a formal receipt, is the more probable. The Sub-Inspector grew excited, and threatened to search Keshab's shop. Then he says Hari Das caused a disturbance and knocked him down. The Sub-Inspector took refuge in his boat: there he was attacked by an angry mob: the boat was pulled ashore, the women were dragged from it by force, the Sub-Inspector was persuaded to go to Surendra's shop where he was kept in confinement, and the furnishings of the boat were carried off. In desperation he agreed to say nothing about what had happened: then he was allowed to go and nearly all his belongings were restored.

On these allegations the following charges were framed:—

(1) against Hari Das, Abdul Khalifa, Surendra, the Panchayet, Keshab Lal Saha, and Purna Chandra Biswas, under section 147, Indian Penal Code, the common object being stated to be "by show of criminal force to compel Bipro Das Chakravarty, Sub-Inspector of Police to omit to search Keshab's shop which he was legally entitled to do."

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(2) against the same five persons under section 380, Indian Penal Code for "theft of a bundle of clothes, a box, some beddings, articles of clothing, utensils etc., in a boat which was used for the custody of property."

(3) against the same five persons, except Abdul Khalifa, under section 365, Indian Penal Code, "for abduction of Jibantara and Probbabati with intent to cause them to be secretly and wrongfully confined."

(4) against Hari Das and Surendra, Panchayet, only under section 365, Indian Penal Code, for abducting "Bipro Das Chakraverty, Police Sub-Inspector, with intent to cause him to be secretly and wrongfully confined."

(5) against Hari Das alone under section 332, Indian Penal Code, for causing hurt to a public servant, the intention being stated in nearly the same words as in the first charge.

The jury was unanimous in acquitting all the accused of all the charges but the learned Judge thinks that Hari Das and Abdul Khalifa should be convicted under section 147, Indian Penal Code and Hari Das under section 332, Indian Penal Code.

It is deplorable to think of the amount of public time that has been spent in the investigation of these charges. Witnesses were examined on ten days in the committing Court, and in the Sessions Court, the hearing went on continuously for ten whole days.

So far as the acquittal of Surendra, Purna and Keshab on all charges, and of Hari Das and Abdul Khalifa, on the charge under section 380, Indian Penal Code and of Hari Das on the charges under section 365 Indian Penal Code I agree in the view taken by the learned Judge.

In regard to Abdul Khalifa it is admitted that there is less evidence against him, than against Hari Das, and the evidence about the hour of occurrence leads me to doubt whether persons who did not take a prominent part were likely to be recognised. I think therefore that the verdict of the jury should be upheld in his case also. He is accordingly acquitted.

That leaves only the case of Hari Das for consideration. It is urged with some force that the learned Judge, having rejected much of the evidence and having accepted the jury's finding on the grave charges, should not have made a reference with the object of having some of the accused convicted on minor charges.* In this case however I do not think the argument applies, for here the prosecution

* [Reference was made to the case of *Harbans Singh v. Fakir Das*, (1902) 7 C. W. N. 77 by the learned vakil for the accused—Ed.]

has failed, not because the evidence as to what happened is false, but because the facts alleged do not amount to the offences of abduction and theft. The substance of the prosecution case remains unaffected and that is that a Sub-Inspector of Police was molested while in exercise of his duties.

On this point the difficulties of the prosecution are increased by the words in which the common object under one section and the intention in the other are set out. The prosecution has taken upon itself to prove that Bipra Das, the Sub-Inspector had a right to search Keshab Saha's shop. It is argued that he had no such right, and that if he had he was acting contrary to the rules in searching after sunset. This question involves the second position of what the Sub-Inspector was doing in the Bazar. He was brought to Surendra's house, to enquire into a theft from Kali Das, but by the time he reached the Bazar he had evidently taken the affairs of the women into his hands. It is quite conceivable that they misrepresented the position to him. But whatever the explanation is, it is clear that he regarded the recovery of the ornaments as one of his first duties: it is also clear that he asked Keshab to produce them and that Keshab did not do so. The Sub-Inspector's right to search the house then depended on the offence which he was investigating and on Keshab's attitude to his demand. On the first point I feel very doubtful as to whether the women had given the Sub-Inspector cause to believe that there had been theft. He said himself, "They said that the ornaments had been taken without their consent, but I did not understand whether the ornament had been stolen or taken for safe keeping." I cannot believe therefore that the Sub-Inspector was investigating any charge of theft from the women. I am disposed to think that he was anticipating the complaint that was made by the husband of theft by the women when they eloped. The first essential therefore was wanting: and in my opinion the second is equally wanting. I share the learned Judge's view that there was no denial of the deposit: all that happened was that Keshab asked for certain formalities which involved delay.

The result is that, framed as the charges are, I do not think that Hari Das can be convicted under either charges and on that account the verdict of the jury must be upheld in his case also.

I have already alluded to the amount of valuable time that has been wasted over this case. I believe that the Sub-Inspector was hustled and treated with disrespect, thanks to his own want of tact, but the ingenuity with which the investigating Inspector and

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Sub-Inspector sought to entangle the accused in charges which the allegations did not support is most regrettable. If there was no one in the Police Department, to curb such misguided zeal, it is surprising that an intelligent Magistrate should have failed to see the facts in true proportion and to realise that the case was one that should be tried in his Court.

The Reference is rejected, the verdict of the jury is upheld and the accused are acquitted.

Suhrawardy J.—The learned Sessions Judge in his exceedingly fair and lucid charge has expressed his opinion disbelieving the major portion of the story for the prosecution. I have carefully considered the evidence and I think he has formed a correct estimate of it. To my mind the whole fracas was due to the ill-judged interference of the Sub Inspector who showed an unusual zeal in the matter worthy of a better cause. I am not sure that in the interest he took in the case, he was actuated by a sense of duty. He went to the spot on receiving information that it was 'rumoured' that one of the party of new comers had lost Rs. 52. He was not apparently attracted to the Bazar by this rumour, but by the further information that two run-away young women with valuable jewellery had arrived there in the course of their wandering. It appears he took no notice of the alleged theft of Rs. 52 but immediately on his arrival interested himself in the affairs of these women. I do not believe that the women voluntarily complained to him, if they ever did, that their ornaments were taken away from them by force or that they were wrongfully confined. I need not go into the facts further as the learned Judge has correctly gauged the whole situation. Having discarded almost the whole prosecution story as exaggerated and incredible, the learned Judge seems to be of opinion that at least one fact was certain : that there was an unlawful assembly, one member of which, the accused Hari Das, assaulted the Sub-Inspector. The incident that led to the assault, as related by the prosecution, is also disbelieved by the Judge. In this state of the record, it cannot be said that the verdict of the jury was perverse : in my opinion it was justified and reasonable.

We are told that the accused were kept in *hajat* for about five months in connection with this case. I cannot too strongly express my disapproval of the seriousness attached to this case brought on such apparently exaggerated charges because a Police officer happened to be the complainant.

I agree in rejecting this Reference.

A. T. M.

Reference rejected : Accused acquitted;

CRIMINAL REVISION.

Before Mr. Justice B. B. Ghose, and Mr. Justice Chotzner.

ARAV SARDAR AND OTHERS

v.

HARA SUNDAR MAJUMDAR AND OTHERS.*

Breach of peace—Order under section 145 of the Code of Criminal Procedure (Act V of 1898) in force—Fresh proceeding under section 145, if can be instituted—Land submerged—High Court's power of interference—Discretion.

The identity of parties and lands being established, it is the duty of a Magistrate to see that the possession of the first party under the previous order passed in a proceeding under section 145 of the Code of Criminal Procedure, is not disturbed. That order is binding on the parties and the unsuccessful party cannot be allowed to disregard it and disturb the possession of the other party without having recourse to law. It is not a proper course for a Magistrate to initiate fresh proceedings under section 145 for maintaining the peace. A temporary submergence of land has not the effect of nullifying the previous order passed with regard to it.

When legal proceedings are taken under the Code of Criminal Procedure which amount to an abuse of process of the Court and the object of which is only to harass the party who has got a previous order of the Magistrate in his favour, the High Court has jurisdiction to interfere and ought to interfere under section 107 of the Government of India Act.

It is competent to a Magistrate to initiate such proceedings as he thinks proper and the High Court will not interfere with his discretion in starting proceedings according to its judgment.

Application for revision by the First Party under section 107 of the Government of India Act, to quash proceedings initiated by the Magistrate under section 145 of the Code of Criminal Procedure.

Babus Manmatha Nath Mukherjee and Hiralal Sanyal for the Petitioners.

Babus Dasarathi Sanyal and Debendra Narain Bhattacharjee for the Opposite Party.

The judgment of the Court was as follows :

We are invited in this Rule which was obtained under section 107 of the Government of India Act to quash certain proceedings initiated by the Sub-Divisional Magistrate of Manikgunge under section 145 Criminal Procedure Code.

* Criminal Revision No. 468 of 1922, against an order of R. H. Hutchings, Sub-Divisional Magistrate of Manickganj, dated the 18th May, 1922.

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The question in controversy lies within a very narrow compass. There was a proceeding under section 145 Criminal Procedure Code between the first party and persons now represented by the second party which resulted in an order being made in favour of the first party on the 29th of August, 1919 declaring such party to be entitled to retain possession until evicted in due course of law and forbidding all disturbance of such possession until such eviction. The principal person of the second party then was one U. N. Roy. The interest of U. N. Roy has now passed to one Hara Sundar Mazumdar and he is now the principal person among the second party. It appears that after Hara Sundar acquired his interest he began to disturb the possession of the first party which was maintained by the order of the 29th August 1919. There is no dispute as to the identity of the parties. There was a question whether the present dispute related to the same land which was the subject matter of dispute in the proceedings mentioned before and the Magistrate deputed a Kanungoe to make a local enquiry. The result of the enquiry shortly stated was that the lands in the present dispute were included within the lands which formed the subject matter of the previous dispute. The learned Magistrate thereupon made an order on the 18th May 1922 which runs as follows :—"I am satisfied from the Kanungoe's report that the eastern boundary of the lands at present in dispute is not identical with that which was the boundary of the lands in the former 145 Criminal Procedure Code. Nevertheless the lands at present in dispute form part of the lands adjudged under the 145 proceeding, but there is evidence of a *bona-fide* dispute as to actual possession now. Therefore as I consider a breach of the peace to be imminent I hereby attach the whole of the lands included in sheet No. 1 Purulia under section 145 Criminal Procedure Code (4). Draw up new proceedings under section 145, parties to produce evidence, as to possession on 6th June, 1922."

The identity of the parties and the lands being established it was clearly the duty of the Magistrate to see that the possession of the first party adjudged under the previous order was not disturbed. That order is binding on the parties and the unsuccessful party cannot be allowed to disregard it and disturb the possession of the other party without having recourse to law. It is not the proper course for the Magistrate to initiate fresh proceedings under section 145 of the Criminal Procedure Code for maintaining the peace.

It has been contended on behalf of the opposite party that this Court has no jurisdiction to quash the proceedings at this stage.

We are of opinion, however, that when legal proceedings are taken under the Code of Criminal Procedure which amounts to an abuse of process of the Court and the object of which is only to harass the party who has got a previous order of the Magistrate in his favour, this Court has ample jurisdiction to interfere and ought to interfere under section 107 of the Government of India Act. The object of the second party is quite apparent in instituting these proceedings. It is to get an order in his favour if possible contrary to the order which was passed in August, 1919 and if not, even an adverse order, which may also be of advantage to him. If the proceedings are allowed to continue and terminate in a fresh order under section 145 Criminal Procedure Code it would affect the first party in another way. As is well known the previous order of the 29th of August 1919 is binding upon the parties to the proceedings and a suit for recovery of possession by a person against whom that order was made can only be brought within three years of the order under article 47 of the Limitation Act. If the proceedings terminate in a fresh order it would be really giving the second party, assuming that the new order is made against him, a fresh start of limitation in order to bring a suit for recovery of possession. That is a proceeding which appears to us can hardly be justified.

It has further been argued on behalf of the opposite party that we should not interfere with the discretion of the Magistrate to proceed either under section 107 Criminal Procedure Code or under section 145 of that Code as he thought fit, and the learned vakil has cited a number of cases in support of his contention. It is no doubt true if things stood alone, it was perfectly competent to the Magistrate to initiate such proceedings as he thought proper and the High Court would not interfere with his discretion in starting proceedings according to his judgment. In this case however it was the duty of the Magistrate, as already pointed out, to maintain the first party in possession under the order passed previously under section 145 Criminal Procedure Code and not to start fresh proceedings under that section. The Magistrate has ample powers under the law to maintain peace and to see that the order made in August 1919 is obeyed. In this case therefore in our opinion the Magistrate did not exercise proper judicial discretion in starting proceedings under section 145 afresh. The result of such a course would be that the binding effect of an order under section 145 Criminal Procedure Code would be disregarded and any number of proceedings may be initiated by any disappointed party leading to no result whatsoever, a position which would surely be intolerable.

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One other argument which was addressed on behalf of the opposite party is that the character of the property has been changed. This we consider does not require any serious consideration ; because even assuming that part of the land was submerged and has reappeared, there was no difficulty with regard to the identification of the lands ; and the mere fact that there was temporary submergence would not nullify the effect of the previous order passed with regard to them on the 29th of August 1919.

We therefore set aside the order of the Magistrate dated the 18th May, 1922 instituting fresh proceedings under section 145 Criminal Procedure Code with regard to the lands in dispute. This order will not preclude the Magistrate from taking such other proceeding as he may consider necessary for the purpose of maintaining the first party in possession of the property and for the preservation of the peace.

A. T. M.

Rule made absolute.

CIVIL RULE.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Mr.
Justice Walmsley.*

AMJAD ALI.

v.

SURESH RANJAN PAL AND OTHERS*

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*Notes of arguments—Pleader, if can submit—Judge, duty of—Pleader going to
Criminal Court—Professional conduct.*

When a case has been fully argued before a Judge, it is not necessary for the pleaders to submit notes of their arguments. It is the duty of the Judge to take such notes of the arguments as he thinks fit when they are being submitted to the Court ; and, if he feels that he has not fully appreciated any part of the arguments which have been submitted to him, it is open to him to call the parties before him so that any further argument may be presented in open Court in the presence of the other side. If it becomes necessary, as in some exceptional case, for the Judge either to require or to receive notes of the pleader's arguments, such notes ought

* Civil Revision Cases Nos. 1, 2 and 91 of 1920, against the orders of the District Judge of Sylhet, under sections 195 and 476 of the Code of Criminal Procedure.

not to be submitted to the Judge by the pleader on one side, without first submitting the notes to the pleader on the other side. If in any case a pleader desires to submit to the Court the notes of his argument or of any further argument, which he thinks in the interest of his client ought to be put before the Court, he should submit them to the pleader on the other side, so that the latter may have an opportunity of making any remarks or any criticism in respect thereof.

Where the allegation was that A, a pleader, laid false information before a Judge with regard to the conduct of B, another pleader, in relation to notes of arguments which B had prepared :

Held, that such matters related to professional conduct and should be settled by some tribunal or person capable of dealing with such matters and that a criminal Court was not such a tribunal to settle the matter.

Applications for Revision.

Prosecutions under section 193 of the Indian Penal Code and applications for sanction to prosecute under sections 195 and 476 of the Criminal Procedure Code.

The material facts appear from the judgment.

Babus Manmatha Nath Mukherjee, and *Probodh Chandra Chatterjee*, Messrs. *A. K. Fazlul Huq* and *A. S. M. Akram* for the Petitioner in Rule No. 1.

Babu Hemendra Kumar Das for the Opposite Party.

Babus Dasarathi Sanyal, *Manmatha Nath Mukherjee* and *Probodh Chandra Chatterjee*, Messrs. *A. K. Fazlul Huq* and *A. S. M. Akram* for the Petitioner in Rule No. 2.

Mr. Orr for the Crown.

Babus Manmatha Nath Mukherjee and *Benoyendra Nath Palit* for the Petitioner in Rule No. 91.

Babus Atulya Charan Bose and *Hemendra Kumar Das* for the Opposite Party.

The judgments of the Court were as follows.

Sanderson C. J.—In this matter there are three Rules which were obtained by Mr. Amjad Ali, who is a pleader, and who has been practising in the District Court of Sylhet and the Courts subordinate thereto since the year 1901. The Rule with which I intend to deal first is No 2 of 1920. That Rule was granted to show cause why an order dated the 17th of December 1919 made by the learned District Judge directing the prosecution of Mr. Amjad Ali under section 193 of the Indian Penal Code should not be set aside. The order for the prosecution arose in this way : It appears that there was an appeal pending before the learned Additional Sessions

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Judge by a man called Kailash Chandra Chaudhuri who had been convicted of some offence. Mr. Suresh Ranjan Pal, a learned pleader, was appearing for the appellant, and Mr. Amjad Ali was appearing on behalf of the Crown. The appeal had been heard and the arguments had been concluded, and, as I understand the facts, these two learned gentlemen asked the learned Additional Sessions Judge to be allowed to submit notes of their arguments: at all events, it does not matter much how it came to pass, it was arranged that these two learned gentlemen should submit notes of their arguments to the learned Additional Sessions Judge. It appears that Mr. Amjad Ali submitted his so-called notes to the learned Additional Sessions Judge without showing them to the learned pleader on the other side: Then, Mr. Suresh Ranjan Pal proceeded to prepare the so-called notes of his arguments for the learned Sessions Judge; and, he appears to have done so in the Bar Library, more or less publicly. The learned District Judge has come to the conclusion that those notes were made but were not in fact submitted. Personally, I have not much doubt that they were prepared for the purpose of submission. I do not suppose that anybody would contend that the so-called notes of Mr. Suresh Ranjan Pal were really notes; they were in the form of a judgment which would have been completed by the learned Additional Sessions Judge attaching his signature thereto. To state the matter quite shortly, without going into detail of what occurred, Mr. Amjad Ali went to the learned District Judge and informed him that Mr. Suresh Ranjan Pal wanted or had attempted to hand to the learned Additional Sessions Judge something in the nature of the draft of a judgment, that he (Amjad Ali) had intervened and prevented that from being done. The learned District Judge after making some enquiries directed proceedings to be taken against Mr. Suresh Ranjan Pal under the Legal Practitioners Act. He held an enquiry and came to the conclusion that Mr. Suresh Ranjan Pal should be acquitted of the charge of professional misconduct which was the basis of those proceedings. He then made the order to which I have referred, namely the order of the 17th of December 1919 that Mr. Amjad Ali should be prosecuted under section 193 of the Indian Penal Code in respect of certain statements which Mr. Amjad Ali had made during the course of the enquiry under the Legal Practitioners Act against Mr. Suresh Ranjan Pal which the learned Judge to say the least thought were not correct. The learned vakil who has appeared for Mr. Amjad Ali has stated this morning in open Court that he could not defend the conduct of Mr. Amjad Ali and on behalf of his

client expressed contrition in respect thereof. In view of that expression by the learned vakil on behalf of Mr. Amjad Ali and in view of the fact that in consequence of these proceedings Mr. Amjad Ali has been in effect debarred from practising since the middle of December last, and in view of the publicity which has been given by reason of these proceedings, my learned brother and I are of opinion that it is not necessary for the ends of justice that this criminal prosecution under section 103 of the Indian Penal Code should proceed: consequently, we make this Rule absolute and set aside the order.

But before parting with this matter my learned brother and I feel that we ought to express our disapproval of the conduct of Mr. Amjad Ali which I have already mentioned, the learned vakil appearing for him to-day has not attempted to defend.

With regard to the question of submitting the notes to the learned Additional Sessions Judge, we are of opinion that when a case has been fully argued, as it was in this case, before a learned Judge, it ought not to be necessary for the learned pleaders to submit notes of their arguments. It is the duty of the learned Judge to take such notes of the arguments as he thinks fit when they are being submitted to the Court; and, if he feels that he has not fully appreciated any part of the arguments which have been submitted to him, it is open to him to call the parties before him so that any further argument may be presented in open Court in the presence of the other side. If it becomes necessary, as in some exceptional case, it may become necessary, for the learned Judge either to require or to receive notes of the learned pleader's arguments, such notes ought not to be submitted to the learned Judge by the learned pleader on one side, without first submitting the notes to the learned pleader on the other side. If in any case a learned pleader desires to submit to the Court the notes of his argument or of any further argument, which he thinks in the interest of his client ought to be put before the Court, he should submit them to the pleader on the other side, so that the latter may have an opportunity of making any remarks or any criticism in respect thereof.

As regards the form of the notes, the learned vakil, Mr. Sanyal with his great experience at the Bar, has admitted that the form of the notes presented by Mr. Amjad Ali could not be defended; although it might be said that the so-called notes, which he submitted, were not perhaps quite such a complete draft of a judgment as the notes which were made by Mr. Suresh Ranjan Pal, in my judgment, there is very little difference between the two—both were objection-

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able, and I desire to make it clear that the submission of "notes" in the form of a draft judgment, as in this case, must not be done again: I confess I am somewhat surprised that the learned Judge when he received the so-called notes from Mr. Amjad Ali, if he read them, did not at once return them to the learned pleader on the ground that they were in a form which should not have been put before a learned Judge.

So much for Rule No. 2.

The next Rule with which I desire to deal is No. 1 of 1920. In that case sanction has been granted to Mr Suresh Ranjan Pal to prosecute Mr. Amjad Ali, the allegation being that he had laid false information before the learned District Judge with regard to the conduct of Mr Suresh Ranjan Pal in relation to the so-called notes which Mr. Suresh Ranjan Pal had prepared. That the two learned pleaders should fall out in the way they did and that it should be thought necessary by one learned pleader to ask for sanction to prosecute the other learned pleader in respect of the allegations which he had made before the learned Judge, to my mind, is lamentable. Such proceedings are derogatory to the learned pleaders themselves and to the honourable profession to which they belong: Such matters as these, if unfortunately they do occur, ordinarily ought not to be the subject matter of criminal proceedings. They relate to professional conduct and should be settled by some tribunal or person capable of dealing with such matters. In this case Mr. Manmatha Nath Mukherjee appearing on behalf of Mr. Amjad Ali has associated himself with everything that Mr. Sanyal has said, and the learned vakil appearing on behalf of Mr. Suresh Ranjan Pal has accepted what Mr. Manmatha Nath Mukherji said, and he intimated that his client did not want to be vindictive. I was glad to hear that statement. The result is that this Rule is made absolute.

As regards the last Rule, that was a Rule obtained by Mr. Amjad Ali in connection with proceedings taken against him by Mr. Radha Benode Das, another learned pleader, who occupied the position of public prosecutor: and, the main statement complained of by Mr. Radha Benode Das was to the effect that Mr. Amjad Ali had seen Mr. Radha Benode Das whispering to the learned Additional Sessions Judge and the suggestion was that it was done with a view to influence the learned Judge as to his decision in the appeal by Kailas which was then pending before him. I do not suppose that there is a word of truth in the suggestion and in fact Mr. Manmatha Nath Mukherjee appearing on behalf of Mr. Amjad Ali has withdrawn the suggestion in an unqualified way and more

than that he has apologized on behalf of Mr. Amjad Ali in open Court to Mr. Radha Benode Das for having made such suggestion; Mr. Bose appearing on behalf of Mr. Radha Benode Das has, I am glad to say, accepted that withdrawal and apology. In respect of this matter also, although the suggestion which was made against Mr. Radha Benode Das must have been very annoying to a professional gentleman of his position, I really do not think that a criminal Court is a tribunal to settle a matter of this kind. Surely in a district like Sylhet there must be some tribunal or person capable of settling or dealing with a dispute of this kind without one learned pleader bringing the other learned pleader into a criminal Court. The Rule in this case is also made absolute.

There is only one other matter to which I need refer and that is that Mr. Sanyal the learned vakil appearing for Mr. Amjad Ali urged before us that his client had been actuated by no improper motive in what he did. He said that his client had been hasty and had been too anxious to obtain a successful issue in the appeal on behalf of his client. Having regard to the fact that he was appearing on behalf of the Crown in a criminal case, I can only say that, in my judgment Mr. Amjad Ali did not display that discretion which I should expect to find on the part of a learned pleader of his standing. I do not think it necessary to say anything more than that, especially having regard to what has already fallen from the learned vakil, who has appeared for him in this Court, and who has expressed on his behalf contrition for the course which he adopted.

In conclusion my learned brother and I hope that there will now be an end of these unpleasant matters and that these learned gentlemen will resume their practice and maintain such amicable relations as ought always to exist between the members of an honourable profession.

Walmsley J.—I agree.

A. T. M.

Rules made absolute.

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CIVIL REFERENCE

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr Justice Chotsner.

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v.

RAJANI KANTA GHOSE, MOOKTEAR.*

Unprofessional conduct—Legal Practitioners Act (XVIII of 1879) Sec. 13 (b)—Prosecuting mooktear drafting written statement for accused—Rule.

A legal practitioner cannot represent conflicting interests or undertake the discharge of inconsistent duties. When he has once been retained and received the confidence of a client, he cannot accept a retainer from or enter the service of those whose interests are adverse to his client in the same controversy, or in matter so closely allied thereto as to be in effect a part thereof. The rule is rigid and is designed not alone, to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights or the interests which he should alone represent.

Fidelity is required from all who hold fiduciary relations; they must not lightly enter upon such relationship, but if they do, they will not be permitted to be disloyal; and of all species of disloyalty, desertion and adherence to the enemy or to the opposite party in a suit is recognised as the worst.

Reference under the Legal Practitioners Act.

The material facts appear from the judgment.

Mr. J. C. Hazra, Babus Gopendra Nath Das and Santosh Kumar Pal for the Mooktear.

Babus Dwarka Nath Chuckerbutty and Surendra Nath Guha in support of the Reference.

The following opinion was delivered.

This is a Reference under section 14 of the Legal Practitioners Act in the matter of Babu Rajani Kanta Ghose, Muktear. The facts proved by the evidence are narrated by the District Judge in his letter of reference. Babu Rajani Kanta Ghose was engaged as a muktear on the side of the prosecution in a criminal case in which there were four accused persons. Under instruction received from one Padmalochun Das, who was looking after the case of two of these accused persons, namely Harihur and Nimbar, Babu Rajani-Kant Ghose prepared a draft written statement on their behalf. It has been proved that neither Harihur nor Nimbar gave instruction direct to him to prepare the draft. The draft written statement was taken to the gentleman who was engaged as Muktear on behalf of

*Reference No. 5 of 1912 by M. Yusuf, Esq. District and Sessions Judge of Midnapur, dated the 11th May, 1912.

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the four accused persons. When he read the written statement he found that it would be impossible to file it in Court inasmuch as it implicated the other two accused to their prejudice. The result was that Babu Naba Krishna Das Adhikary did not file the written statement. It is thus obvious that Babu Rajanikant Ghose while engaged for the prosecution in the criminal case did prepare a written statement for the use of two of the accused persons. In these circumstances the Sub-Deputy Magistrate took proceedings under the Legal Practitioners Act and framed a charge in the following terms : "Whereas it appears that you were retained by the prosecution in the case of Pahul Mali Sishir Kumar Das Mohapatra and others and whereas it appears that you had drafted a written statement on behalf of accused Harihur and Nimbar and thereby acted contrary to the provisions of section 13 (a) of the Legal Practitioners Act, I charge you under the said section of the said Act". The mukhtear filed a written statement in answer to this charge. Evidence was recorded in due course and this Reference ultimately made by the District Judge as already stated.

It has been argued before us by Mr. Hazra that no case has been made out under section 13 (a) of the Legal Practitioners Act inasmuch as the evidence establishes that Padmalochan Das who approached Babu Rajani Kanta Ghose was authorised by Harihur and Nimbar to look after the criminal case on their behalf. In our opinion, it is not necessary to consider whether the evidence does or does not establish this point. The Reference need not be treated as one under section 13 (a) which provides for the case where a Mukhtear takes instructions except from the party on whose behalf he is retained or some person who is the recognised agent of such party within the meaning of the Code of Civil Procedure or some servant, relative or friend authorised by the party to give such instructions. The facts stated in the notice issued by the Sub-Deputy Magistrate show that the case was really under section 13 clause (b) which includes a case where a legal practitioner is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty.

There is in our opinion, no doubt as to what actually happened. It is plain upon the evidence and upon the admission of the Mukhtear that while he was acting on behalf of the prosecution, he drafted a written statement on behalf of two of the accused persons. An attempt has been made to support the theory that he might have forgotten the facts of the case and might not have realised that the written statement which he drafted related to the very case he was

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to conduct on behalf of the prosecution. We find from the record however, that he accepted the Mukhtearnama on the 14th June 1921 when the proceedings were instituted and the written statement was not drawn up till the 16th February 1922 at the concluding stage of the trial. During the six months which had elapsed, he might be expected to have made himself familiar with the case for the prosecution. Indeed he does not allege that he was under a misapprehension. He pleaded that he did not realise that his conduct was improper; in other words, he believed in good faith that though he was Mukhtear for the prosecution, he was free to prepare the written statement for the accused.

As this has happened once and may happen again, it is desirable to state the well-settled general rule that a legal practitioner cannot represent conflicting interests or undertake the discharge of inconsistent duties. When he has once been retained and received the confidence of a client, he cannot accept a retainer from or enter the service of those whose interests are adverse to his client in the same controversy or in matter so closely allied thereto as to be in effect a part thereof. The rule is rigid and is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interests which he should alone represent. This is not the first instance in which the Rule has been taken and reference may be made to the cases of *Davies v. Clough* (1); *Cholmondeley v. Clinton* (2); *Day v. Pousna* (3).

Fidelity is required from all who hold fiduciary relations; they must not lightly enter upon such relationships, but if they do, they will not be permitted to be disloyal; and of all species of disloyalty, desertion and adherence to the enemy or to the opposite party in a suit is recognised as the worst. On these grounds it has been held that an attorney may be disbarred where he conducts a criminal prosecution against a person or assist therein, and thereafter appears for the defence, or while acting as attorney for the prosecutor in a criminal case he accepts money from the defendant in consideration of a dismissal. Reference may in this connection be made to the decisions in *Ali Muhammad v. Syamlall* (4); *Ugir v. Sridhar* (5);

(1) (1837) 8 Sim. 262.

(2) (1815) 19 Ves. 261; Cooper, temp. Eldon. 86.

(3) (1842) 5 Ir. E. R. 24.

(4) (1903) 5 P. L. R. 180.

(5) (1904) 1 Nag. L. R. 52.

Durga Pershad v. Baiyan Bai (1); *Pallonji v. Kallabhai* (2); *Ramlall Agarwalla v. Moonia Bibee* (3) and *Queen v. Besonji* (4). We may observe that the conduct imputed to an attorney when it is said that he has received instructions from both sides in a cause is so disreputable that unfounded allegation to this effect is considered actionable without proof of special damage: *Shire v. King* (5); *Broke's case* (6).

The mukhtear before us is not the first member of the legal profession who has been under the delusion that it is open to a person to appear on behalf of the prosecution and at the same time to assist the defence. The case of *People v. Spencer* (7), shows that he has had a predecessor where the attorney concerned conducted the case for the prosecution and then looked after the case for the defence. When he was called upon to explain his conduct he stated in all innocence that he did not realise that his conduct was reprehensible. The Court therefore made the following observation: "By appearing both for the plaintiff and defendant in the same action he was guilty of a violation of his duty as an attorney for which it is our duty to remove or suspend him. Neither his ignorance of the laws nor the crudity of his notions of professional ethics, can excuse an offence against professional propriety by one whose duty it is to assist in the administration of justice. The degree of turpitude involved in the breach of his duty by an attorney, however, must appear in the circumstances of each case. The punishment which should follow an inadvertent or ignorant departure from professional propriety—no seriously evil consequences having resulted—should be less severe than where the offence is a deliberate or corrupt violation of official oath. The circumstances presented by the record while they go towards showing an absence of intentional wrong, do not justify respondent. However innocent his motives, his conduct must be condemned yet. In consideration of the facts, we are disposed to inflict a penalty which, while it shall satisfy the provisions of the Code and mark our disapprobation of his act, shall not for ever debar the respondent from the further practice of his profession." The Court then suspended the attorney from practice for a period of three months. We are of opinion that in the case before us a similar order may be made. We direct accordingly that the mukhtear be suspended for a period of three months from this date.

A. T. M.

Reference answered.

(1) (1898) 12 C. P. L. R. 35.

(3) (1880) I. L. R. 6 Cal. 79.

(5) (1603) Yelv. 32; reported as *King v. Shire* in (1603) Cro. Eliz. 914.

(6) (1595) Moore 409.

(2) (1887) I. L. R. 12 Bom. 85.

(4) I. L. R. 12 Bom. 91 Foot Note.

(7) (1882) 61 Calif. 128.

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APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Rankin.

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August, 2, 1922.

MANMATHA NATH KAR

v.

PROBODH CHANDRA RATARHI.*

Ejectment—Purchaser of non-transferable occupancy holding—Presumption—Rent payable in kind—Bengal Tenancy Act (VIII of 1885), Sec. 50, applicability of—Analogy—Evidence de hors, admissibility of—Intention of writer—Demand for rent, if constitutes relationship of landlord and tenant.

Section 50(2) of the Bengal Tenancy Act is limited in its application to suits or proceedings under the Act. But even though the section is not applicable to a suit for ejectment: [*Sarat v. Shyam* (1), and another case], the Court may act on a presumption similar to one arising under the section, if the facts justify the necessary inference: *Nityananda v. Nanda Kumar* (2) and other cases.

The presumption mentioned in section 50 of the Bengal Tenancy Act applies whether the rent is payable entirely in cash or partly in cash and partly in kind or entirely in kind: *Dina v. Raja Sati* (3). The same principle applies to suits or proceedings where the rule embodied in section 50 is extended by analogy.

Outside evidence, is not admissible to show the intention of the writer, which is not disclosed by the authorised channel, namely, the words which he himself selected: *G. W. Railway v. Bristol Corporation* (4).

Where the defendant purchased holdings on the assumption that they were transferable and he professed to be tenant in occupation, demand by the plaintiff for rent is good evidence of mutual consent to the creation of a tenancy, unless the plaintiff is able to explain that the demand was not unqualified and should be differently interpreted: *Underhay v. Read* (5) and *Brown v. Storey* (6).

Appeal by the Defendant.

Suit for recovery of possession of land upon establishment of title.

The material facts appear from the judgment.

Dr. Dwarka Nath Mitter and Babu Pyari Mohan Chatterjee for the Appellant.

Babu Lalit Mohan Mitra for the Respondent.

C. A. V.

The judgment of the Court was delivered by

*Appeal from Appellate Decree No. 753 of 1921, against the decree of Babu Nitai Charan Ghose, Subordinate Judge of Midnapore, dated the 13th December 1920, reversing that of Babu Mayatara Haldar, Munsiff of Midnapore, dated the 13th November, 1919.

(1) (1906) 10 C. W. N. 930; 3 C. L. J. 62n.

(2) (1910) 13 C. L. J. 415.

(3) (1922) 36 C. L. J. 220.

(4) (1918) 87 L. J. Ch. 414.

(5) (1887) 20 Q. B. D. 209.

(6) (1840) 1 M. & G. 117.

Mookerjee J.—This is an appeal by the defendant in a suit for recovery of possession of land upon establishment of title. The plaintiff is the landlord of the disputed property, which, according to him, comprises two non-transferable occupancy holdings and was purchased by the defendant on the 21st August, 1917 at a sale in execution of a mortgage decree. The defendant contended, first, that the holdings belonged to a raiyat at fixed rent and were consequently transferable under section 18 of the Bengal Tenancy Act; secondly, that what had been mortgaged and was brought to sale was not the entire land of the two tenancies, so that he was the purchaser of a portion of the holdings and was consequently not liable to be evicted; and thirdly, that he had been recognised as tenant by the landlord, who had, after his purchase, demanded rent from him. The trial Court held that the tenancy could not be deemed to consist of holdings at fixed rent, as the rent was payable partly in cash and partly in kind. The Court further held that there had been no recognition by the plaintiff of the purchase of the tenancy by the defendant. But the Court upheld the contention that what had been mortgaged and sold was less than the entire land of the tenancy. In this view, the claim for recovery of possession was dismissed: *Dayamayi v. Ananda Mohan* (1). Upon appeal, the Subordinate Judge has reversed this decision. He has affirmed the findings of the Court of first instance upon the questions of the nature of the tenancy and the plea of estoppel. The Subordinate Judge has, however, held that the sale certificate covers the entire lands of both the holdings. In this view, he has concluded that the holdings had been abandoned by the original tenants, with the result that the plaintiff was entitled to re-enter. Upon the present appeal, the decision of the Subordinate Judge has been challenged on three grounds: namely, first, that the holdings constituted tenancies at fixed rents, notwithstanding that the rent was payable partly in cash and partly in kind; secondly, that the question, whether the defendant has made a valid purchase of all the lands of the holdings must be determined with reference to, not the sale certificate, but the mortgage-deed; and thirdly, that the question of recognition has not been properly decided.

As regards the first question, the evidence, it is urged, makes it abundantly clear that the holdings have been held at rent which has not been changed for many years. It is not disputed, however, that the rule of presumption embodied in section 50 (2) of the Bengal Tenancy Act is not by its terms applicable. That section

(1) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.

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is, by its terms, limited in its application to suits or proceedings under the Bengal Tenancy Act. A suit for ejectment does not fall within that description: *Sarat v. Shyam Chand* (1); *Rasamoy v. Srinath* (2). But, it has been ruled that even in cases where section 50 is not directly applicable, the Court may act on a presumption similar to the one arising under the section, if the facts justify the necessary inference: *Nityananda v. Nanda Kumar* (3); *Bazlul v. Satis Chandra* (4); *Pran Krishna v. Mukta Sundari* (5). Now, in respect of section 50, it has been recently held, in the case of *Dina Nath Pal v. Raja Sati Prasad Garga* (6), that the presumption applies whether the rent is payable entirely in cash or partly in cash and partly in kind, or entirely in kind. The same principle plainly applies to suits or proceedings where the rule embodied in section 50 is extended by analogy. It follows that the Courts below have erroneously held that the disputed holdings could not be tenancies held at fixed rents merely because the rent was payable partly in cash and partly in kind. The relevant facts must accordingly be investigated and the Court must determine, whether the tenancies have been held at a uniform rent or rate of rent for such a length of time as to justify the inference that they must have been in their inception holdings at rents fixed in perpetuity, in other words, Mourasi Makarari holdings.

As regards the second question, it is plain that the Subordinate Judge has not examined the matter from the correct standpoint. The root of the title of the defendant is the mortgage deed. With reference to the boundaries set out therein, compared with the entries in the record-of-rights, the trial Court came to the conclusion that one plot, that is No. 996, was not included in the mortgage. This finding has not been expressly reversed by the Subordinate Judge; but he has proceeded on the assumption—not founded on the evidence—that there may have been a mistake in the record-of-rights. We are of opinion that this point requires reconsideration. We may add that whatever title may have vested in the defendant, must be traced to the mortgage bond and cannot be rested on an admission of the tenant himself. The question clearly is not, what the tenant intended to mortgage, but what was conveyed by virtue of the description actually inserted therein. The admission of the tenant cannot be utilized to contradict the document, and it would

(1) (1906) 10 C. W. N. 930; 3 C. L. J. 62n.

(2) (1902) 7 C. W. N. 132.

(3) (1910) 13 C. L. J. 415.

(4) (1911) 13 C. L. J. 418.

(5) (1913) 18 C. L. J. 193.

(6) (1922) 36 C. L. J. 220.

be dangerous to allow outside evidence to show the intention of the writer, which is not disclosed by the authorised channel, namely, the words which he himself selected. This does not require elaboration and reference need only be made to the decision of the House of Lords in *G. W. Railway v. Bristol Corporation* (1), where the earlier authorities will be found reviewed.

As regards the third point, we are of opinion that the question of recognition has not been properly examined. The evidence indicates that the plaintiff demanded rent from the defendant, with full knowledge that the latter was in possession as purchaser of the tenant's rights in the land. *Prima facie* this is evidence of an intention, unless otherwise explained, to recognise the title of the purchaser, and unless repudiated, would constitute the relationship of landlord and tenant. The observations in *Deonandan v. Meghu* (2), where, on the authority of *Evans v. Elliott* (3), and *Towerson v. Jackson* (4), it was stated that mere demand for rent is not sufficient to create the relationship of landlord and tenant, unless followed by assent in response thereto, do not affect the case before us. Here, the defendant purchased the holdings on the assumption that they were transferable and he professed to be tenant in occupation. In such circumstances, demand by the plaintiff for rent is good evidence of mutual consent to the creation of a tenancy, unless the plaintiff is able to explain that the demand was not unqualified and should be differently interpreted; see *Underhay v. Read* (5), which refers to *Brown v. Storey* (6). This aspect of the case has not been investigated by the Courts below.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside, and the case remanded to him for reconsideration. Costs will abide the result.

A. T. M.

Appeal allowed: Case remanded.

(1) (1918) 87 L. J. Ch. 414.

(2) (1906) 5 C. L. J. 181; 1 L. R. 34 Calc. 37.

(3) (1838) 9 A. and E. 342; 48 R. R. 620.

(4) (1891) 2 Q. B. 484.

(5) (1887) 20 Q. B. D. 209.

(6) (1840) 1 M. & G. 117.

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PRIVY COUNCIL.

PRESENT : *Viscount Cave, Lord Dundin, Lord Shaw and
Sir John Edge.*

KHAJEH SOLEHMAN QUADIR AND ANOTHER

v.

NAWAB SIR SALIMULLAH BAHADUR AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.]

*Wakf—Mahomedan Law—Family settlement based on invalid wakfs but in
compromise of disputed claims—Validity—Annuities out of income of prop-
erty—Charge—Mussulman Wakfs Validating Act (VI of 1913), effect of.*

The Mussulman Wakfs Validating Act of 1913 is not retrospective and cannot be construed as validating deeds executed before its date. Deeds which purported to create by gift a perpetual succession of interests for the aggrandisement of the family of the donor, were not valid under Mahomedan law and were not validated by the use of the term "Wakf" or by the insertion of a remote trust for the poor: *Sheik Mahomed Ahsanulla v. Amarchand Kundu* (1); *Abdul Gafur v. Nisamudin* (2); *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (3); *Maulvi Sayyid Muhammad Ali v. Rasia Bibi* (4) referred to.

Agreements by way of compromise of a pending litigation fixing certain allowances to living and named persons to be continued to their heirs, though based on invalid wakfs, are valid and enforceable. A direction to pay the allowances out of the income of the properties shows an intention to create a charge: *Nawab Umjad Ally Khan v. Musumat Mohumdee Begum* (5); *Lakshmi Narayana Ananga v. Vadkawa Deo* (6); *Khawaja Muhammad Khan v. Husaini Begum* (7); and *Raja of Ramnad v. Sundara Fandiyasami Tevar* (8) followed.

Appeal from a decree of the Calcutta High Court (Mookerjee and Walmsley JJ.) reversing a decree of the Subordinate Judge of Dacca.

Two documents executed in 1846 and 1868 purported to be wakfs but were really intended to make perpetual provision for the members of the family of the donors by settling upon them properties from generation to generation so long as the family should last.

(1) (1889) L. R. 17 I. A. 28; I. L. R. 17 Calc. 498.

(2) (1892) L. R. 19 I. A. 170; I. L. R. 17 Bom. 1.

(3) (1894) L. R. 22 I. A. 76; I. L. R. 22 Calc. 619.

(4) (1905) L. R. 32 I. A. 86; I. L. R. 27 All. 320; 2 C. L. J. 179.

(5) (1867) 11 M. I. A. 517; 10 W. R. P. C. 25.

(6) (1892) L. R. 20 I. A. 9; I. L. R. 16 Mad. 268.

(7) (1910) L. R. 37 I. A. 152; I. L. R. 32 All. 410; 12 C. L. J. 205.

(8) (1918) L. R. 46 I. A. 64; I. L. R. 42 Mad. 518; 29 C. L. J. 551.

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March, 2.

As such a settlement was not recognised by Mahomedan law, the donors sought to validate it by inserting a distant and contingent provision for charitable purposes. In 1880, some of the members of the family who were dissatisfied with the allowances sued the mutwallis appointed under the deeds of 1846 and 1868 alleging that the deeds were invalid and claiming accounts upon that footing and payment of their share. The suit was eventually compromised upon the terms of two agreements dated the 26th August and the 17th September, 1881. The material clauses in the two agreements are fully set out in their Lordships' judgment. The allowances were continued to be paid till 1895, when the respondent's predecessors contended and gave notice to the appellants that the allowances mentioned in the agreements of 1881 were personal to the payees and that they were not liable to continue the same to the heirs of such payees in perpetuity. They stopped the allowances to the appellants who are the heirs of two of the payees mentioned in the agreements.

The appellants brought the present suit claiming Rs. 45,692 as arrears of allowances due to them under the agreements of 1881. The respondents raised defences that the wakfs were not valid, that the allowances referred to in the agreements were only personal and that, as the appellants were not even born then, they were not entitled to any relief. The trial Judge decreed the claim but that decree was set aside by the High Court on appeal.* Hence the present appeal by the plaintiff.

De Gruyther K. C., Ramsay and Palat for the Appellants: The deeds of 1846 and 1868 may not be valid under Mahomedan law but they are validated by the Mussulman Wakfs Validating Act of 1913. Whatever that may be, the appellants' claim is not based upon them but upon the agreements of 1881. Those agreements were entered into by way of compromise of a suit filed by certain members of the family. Thus the agreements are for valuable consideration. The allowances were made a charge on the income of the properties and in favour of the appellants. It is in the nature of a trust and it is immaterial whether the appellants were parties or not: *Nawab Umjad Ally Khan v. Musumat Mohumdee Begum* (1); *Lakshmi Narayana Ananga v. Madhawa Deo* (2); *Khawaja Muhammad Khan v. Husaini Begum* (3); *Raja of Ramnad v. Sundara Pandiyasami* (4).

* For High Court Judgment see 30 C. L. J. 102.

(1) (1867) 11 M. L. A. 517; 10 W. R. P. C. 25.

(2) (1892) L. R. 20 I. A. 9; 1 L. R. 16 Mad. 268.

(3) (1910) L. R. 37 I. A. 152; 1 L. R. 32 All. 410; 12 C. L. J. 205.

(4) (1918) L. R. 46 I. A. 64; 1 L. R. 42 Mad. 518; 29 C. L. J. 551.

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The present case is distinct from cases of pure gifts or settlements without consideration such as you have in *Amtul Nissa v. Mir Nur-udin* (1). Mahomedan law recognises gifts, although conditional on payment of part of the income to named persons and their heirs: *Umjad Ally Khan v. Mohumdee Begum* (2). Trusts also are recognised: *Ameeroonissa Khatoon v. Abedoonissa Khatoon* (3); *Tavakal-bhai v. Imatiyas Begam* (4); *Lali Jan v. Muhammad Shafi* (5).

The rule laid down in the *Tagore case* (6) that by Hindu law a donee must be in existence at the time when the gift takes effect, expressly provides an exception in favour of provisions by way of contract. This has to be kept in view in considering cases under Mahomedan law. The respondent is in possession of the properties merely as a trustee to carry out the agreement of 1881 he could not own the properties as mutwalli of the wakfs: *Muhammad Rustam Ali v. Mushlak Husain* (7); *Vidya Varuthi Thirtha v. Balusami Ayyar* (8); *Chundi Churn Barua v. Sidheswari Debi* (9); *Mahomed Ahsanulla v. Amarchand Kundu* (10); *Moosabhai v. Yacoub-bhai* (11); *Mahomed Ibrahim v. Abdul Latiff* (12).

Dunns K. C. and Brown for the Respondents: The agreement of 1881 proceeded on the basis of the wakf deeds of 1846 and 1868. The wakf deeds were invalid and inoperative: *Abdul Fata Mahomed Iskah v. Russomoy Dhur* (13); *Abdul Gafur v. Nizamuddin* (14); *Moulvi Sayyid Muhammad Ali v. Razia Bibi* (15); *Ramanadan Chetty v. Vava Levvai Marakayar* (16).

The agreement falls with the wakfs and is bad under Mahomedan law whether it is regarded as a gift or settlement. There could have been no delivery as the donee under the wakfs is God: *Nawab Umjad Ally Khan v. Mohumdee Begum* (2), merely decided that a gift

(1) (1896) I. L. R. 22 Bom. 489.

(2) (1867) 11 M. I. A. 517; 10 W. R. P. C. 25.

(3) (1874-5) L. R. 2 I. A. 87; 15 B. L. R. 67.

(4) (1916) I. L. R. 41 Bom. 372.

(5) (1912) I. L. R. 34 All. 478.

(6) (1872) L. R. Sup. Vol. I. A. 47; 9 B. L. R. 377.

(7) (1920) L. R. 47 I. A. 224; 32 C. L. J. 471.

(8) (1911) L. R. 48 I. A. 302; 26 C. W. N. 537.

(9) (1898) L. R. 15 I. A. 149; I. L. R. 16 Calc. 71.

(10) (1889) L. R. 17 I. A. 28; I. L. R. 17 Calc. 498.

(11) (1904) I. L. R. 29 Bom. 267.

(12) (1912) I. L. R. 37 Bom. 447.

(13) (1894) L. R. 22 I. A. 76; I. L. R. 22 Calc. 619.

(14) (1892) L. R. 19 I. A. 170; I. L. R. 17 Bom. 1.

(15) (1905) L. R. 32 I. A. 86; I. L. R. 27 All. 370; 2 C. L. J. 179.

(16) (1918) L. R. 44 I. A. 21; I. L. R. 40 Mad. 116; 25 C. L. J. 224.

was valid, though made conditional on payment of a part of the income to a named person. It does not say whether the gift would have been valid if the income was to be paid to the named person and his heirs. This must be distinguished from cases of allowances for maintenance from the property of an impartible Raj: *Raja of Ramnad v. Sundara Pandiyasami* (1). A bad wakf cannot be converted into a good trust. In such cases the mutwalli holds for the settlor.

De Gruyther K. C. replied and referred to *Srinivasa Murthy v. Venkatavarada Iyengar* (2).

C. A. V.

The judgment of their Lordships was delivered by

Viscount Cave—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal dated the 6th June, 1919, which reversed a judgment and decree of the Court of the Subordinate Judge of Dacca dated the 16th April, 1917. The facts giving rise to the dispute may be stated as follows:—

Early in the 19th century one Khajeh Abdulla, a Mahomedan trader of Dacca, died intestate, possessed of the property in dispute and leaving among other heirs four sons named Ahsanullah, Hafizullah, Abdul Azim and Abdul Karim.

On the 5th May, 1846, certain members of the family executed a deed whereby they purported to "make wakf of" certain family properties therein described for the benefit of themselves and their descendants generation after generation, and relatives, and then for the poor and destitute; and they thereby appointed Abdul Gani (grandson of Ahsanullah) to be *mutwali* of the properties, and directed him to pay to the heirs of Hafizullah, Abdul Azim and Abdul Karim, certain monthly allowances mentioned in the schedule and to keep the balance in deposit. On the 11th September, 1868, Abdul Gani appointed his son Ahsanullah to be *mutwali* of this deed in his place.

On the same date, namely, the 11th September, 1868, Abdul Gani executed a deed whereby he purported to "make perpetual wakf of" certain other properties of which he claimed to be the owner by inheritance or purchase in favour of his sons and offspring and all the members and relatives descended from his grandfather, the wakf being descendible to children both in the male and female

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(1) (1918) L. R. 46 I. A. 64; I. L. R. 42 Mad. 518; 29 C. L. J. 551.

(2) (1911) L. R. 38 I. A. 129; I. L. R. 34 Mad. 257; 14 C. L. J. 64.

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lines, and on their failure, in favour of the fakirs and the poor indigent of Dacca ; and he thereby appointed his son Ahsanullah to be *mutwali* of the *wakf* so created, and directed him to spend money befitting his *reasat* and to pay allowances to the parties in whose favour the *wakf* was made, with power to increase or reduce such allowances. This deed contained the following clause :—

The object of the *wakf* of the properties is this, that they be protected from injury and ruin, and that the name and dignity of the family be maintained, and that the profits of the estate be, according to the practice and usage of the family, spent for the improvement of the position and dignity of the family, for the comfort and benefit of the persons in whose favour the *wakf* is made, and for the performance of the worldly and religious affairs and of charitable acts.

The purpose of these two deeds is plain. The intention of the donors in each case was to make perpetual provision for the members of their family by settling the properties upon such members generation after generation so long as the family should last ; and as such a settlement was not recognised by Mahomedan law, they sought to validate it by calling it a *wakf* and by inserting a distant and contingent provision for charitable purposes.

In the year 1880 some members of the family descended from the donors of 1846, being dissatisfied with the allowances paid to them out of the income of the settled properties (which had greatly increased), brought a suit in the Court of the Subordinate Judge at Dacca against Abdul Gani and Ahsanullah his son, alleging that the deed of 1846 was not valid as a *wakf* and that the deed of 1868 comprised properties purchased by the *mutwali* out of income accrued under the deed of 1846 and claiming accounts upon that footing and payment of their share. Among the parties to this suit were Amirullah (the father of the appellants), his mother Izzatennessa Bibi, his wife Halima Bibi, and her mother Ayesha Khanum. The precise interests of these persons in the properties comprised in the two deeds of *wakf* are not clear on the record, and it is not now material to ascertain them ; but it is plain that they had or claimed interests in the properties comprised in both deeds.

The suit was heard, but before judgment was pronounced some friends of the family (including the then Lieutenant-Governor, Sir Ashley Eden, and the District Judge, Mr. Rampini) intervened in the interests of peace, and ultimately a compromise was effected and the suit was stayed upon the terms of two agreements, dated the 26th August, 1881, and the 17th September, 1881.

By the agreement of the 26th August, 1881, which was signed by

or on behalf of all the parties to the suit of 1880, it was agreed that all the persons entitled to receive allowances under the deed of 1846, and all the defendants to the suit except Abdul Gani and his son Ahsanullah, should be made plaintiffs in the suit, and that the suit should be withdrawn without power to bring any fresh suit for the same subject-matter. The principal terms of the agreement were contained in the following clauses :—

4. The persons signing this Memorandum of Agreement admit that the two deeds of 1253 B. E. and 1275 B. E. [1846 and 1868] are valid and binding deeds of *wakf*.

5. The persons signing this Memorandum of Agreement admit that the properties held as *wakf* by the Nawab Ahsanullah under the deed of 1253 B. E. now consist of the properties entered in Schedule A appended to this Memorandum of Agreement and of no other properties, and that the properties held as *wakf* by the Nawab Ahsanullah under the deed of 1275 B. E. now consist of the properties entered in Schedule B appended to this Memorandum of Agreement and of no other properties.

6. The Nawab Ahsanullah consents, by virtue of the power vested in him as *mutwali* by the said two deeds, to increase the allowances of the various members of the family whose names are entered in the Schedules C and D appended to this Memorandum of Agreement to an aggregate or total amount of Rupees one lac thirty-three thousand and eighty-four and eleven annas only per annum. And it is declared that the persons whose names are entered in the Schedule C appended to this Memorandum of Agreement are the persons entitled to allowances payable out of the income of the properties held as *wakf* under the deed of 1253 B. E. And the persons whose names are entered in the Schedule D appended to this Memorandum of Agreement are the persons entitled to allowances payable out of the income of the properties held as *wakf* under the deed of 1275 B. E. And it is agreed that the particular amount to be paid to each individual person shall be fixed hereafter by a Committee consisting of four male members of the family who shall be lineal descendants of the original proprietors of the estates entered in the said Schedules A and B, two of the said four male members being nominated by the Nawab Ahsanullah and two by the plaintiffs of the Suit No. 189 of 1880, and the said four members having power to select an umpire with a casting vote from amongst their number or to select one other member of the family to be an additional member of their Committee, but who shall have one vote only.

7. On the amounts of the allowances to be paid to each indi-

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vidual member of the family being fixed by the said Committee, the Nawab Ahsanullah shall within two weeks' time execute an agreement on stamped paper agreeing to pay to each individual member the amount of the allowance fixed for him or for her by the said Committee, and stipulating that such allowance shall not be stopped except as hereinafter provided in this Memorandum of Agreement.

11. On the death of any member of the family in receipt of an allowance, his or her allowance shall be distributed amongst his or her heirs and residuaries in proportions to be determined by the family *panchayet* to be appointed as hereinafter provided.

18. The family *panchayet* referred to in Clauses 8, 11, 12, 13, 14, 15 and 17, and which shall consider and determine all the aforesaid family arrangements shall consist of the *mutwali* for the time being, if he chooses to sit, and four male members of the family being lineal descendants of the original proprietors of the estates mentioned in the said Schedules A and B, which four members shall be elected biennially by such adult male and female members of the family as choose to vote at the election, after having received due notice.

The agreement of the 17th September, 1881, which was signed by Ahsanullah only, after a recital to the effect that a Committee, selected in accordance with Clause 6 of the agreement of the 26th August, 1881, had fixed the amounts entered in the schedule given below as the amounts of the monthly allowances to be paid to the members of the family, whose names were entered in the same schedule, proceeded as follows :—

I, the Nawab Ahsanullah Khan Bahadur, as *mutwali* of the deeds of *wakf* of 1253 B. E., and 1275 B. E., referred to in the said Memorandum of Agreement, do hereby execute this agreement and agree, firstly, that within seven days after the beginning of each month of the Bengali calendar I and all future *mutwalis* shall pay to each member of the family whose name is entered in the Schedule appended to this agreement the amount of the allowances entered against his or her name; secondly, that neither I nor any future *mutwali* shall stop or withhold payment of the allowances entered in the Schedule given below without just cause, such cause to be first declared just by the family *panchayet* to be elected biennially in accordance with Clause eighteen of the said Memorandum of Agreement; thirdly, that on the allowance of any member of the family being so stopped, I and all future *mutwalis*, after deduction of any compassionate allowance which I or any future *mutwali* may make to the said offending member, shall pay the balance of the allowance so stopped to his or her family or relatives dependent on

him or her; fourthly, that on the said biennially elected family *panchayet* determining on sufficient cause being shown to it that the allowance so stopped should be restored to the offending member, I or any future *mutwalis* shall accordingly restore and continue it; and fifthly, on the death of any member of the family in receipt of an allowance, I and all future *mutwalis* shall distribute the amount of his or her allowance amongst his or her heirs and residuaries in proportions to be determined by the said biennially elected family *panchayet*.

The schedule contained a list of the monthly allowances to be paid to the several members of the family out of the income arising from each of the two deeds, and included allowances under the deed of 1868 of Rs. 20 a month to Izzatennessa, Rs. 150 a month to Ayesha Khanum, and Rs. 150 a month to Amirullah. The suit was duly withdrawn in accordance with the agreements.

For some years after the execution of these agreements peace reigned in the family and the allowances secured by the agreements were duly paid. On the death of Izzatennessa her son Amirullah became entitled to a share of her estate, and a proportionate part of her monthly allowance of Rs. 20 was thenceforth paid to him; and on the death of Ayesha Khanum her daughter Halima (the wife of Amirullah) succeeded to a share of her estate, and a proportionate part of her monthly allowance of Rs. 150 was thenceforth paid to her. But in the year 1889 and the following years a series of decisions of this Board established that a settlement of property upon successive generations of a Mahomedan family, such as was attempted to be made by the deeds of 1846 and 1868, was void by Mahomedan law and was not validated by the use of the term "*wakf*" and the insertion of a remote and illusory provision for charitable purposes. (See *Sheik Mahomed Ahsanullah Chowdhry v. Amarchand Kundu and others* (1); *Abdul Gafur and others v. Nizam-uddin* (2); *Abdul Fata Mahomed Ishak and others v. Russomoy Dhur Chowdhry and others* (3). In consequence of these decisions the Nawab Ahsanullah and his father (then Sir Abdul Gani, K.C.S.I.) appear to have taken advice as to the legal effect of the two deeds of *wakf* and the agreements of 1881, with the results to be now stated.

On the 18th January, 1895, Sir Abdul Gani executed a *Haba-Bilewas* (or deed of gift) whereby, after referring to the decisions of the Board and reciting that he was convinced and had been advised by lawyers that the *wakfnama* executed by him on the 11th Septem-

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ber, 1868, was not legally valid, he purported to make a gift in favour of his son Ahsanullah and his heirs of the properties therein described, being the greater part of those comprised in the deed of 1868; and he added :—

As I am a party to the said Memorandum of Agreement executed on the 26th of August, 1881, and as the legal effect, construction and force thereof are therefore binding upon me, you shall as the malik in possession hold and enjoy the properties which I make over to you by this Heba-Bilewaz, subject to the legal effect and construction of the said Memorandum of Agreement.

Shortly afterwards Ahsanullah gave notice to the heirs of such of the persons entitled to allowances under the agreements of 1881 as had died since the execution of those agreements that he had been advised that the effect of the agreements of 1881 was that he was liable to pay allowances from the income of the properties covered by the *wakf* of 1818 to such persons only as were parties to the agreement of the 26th August, 1881, and whose names were given in schedule D of that agreement, but that he was not liable to pay such allowances to the heirs of such persons in perpetuity. Accordingly on the death of Amirullah (who died on the 3rd December, 1895) and of his wife Halima (who died on the 29th April, 1896) Ahsanullah stopped payment of the allowances under the deed of 1868 to which they had been entitled under the agreements either personally or as heirs of Izzatennessa and Ayesha Khanum, and refused to continue those allowances to their heirs. The heirs of Amirullah and Halima, who are the present appellants, were then minors of the age of four and three years respectively; but shortly after attaining their majority they instituted the present suit against Salimullah Bahadur (the heir of Ahsanullah, who had then died), claiming arrears of their allowances, amounting to Rs. 45, 692 and a declaration that the allowances were a charge on the properties comprised in the deed of 1868. They also claimed that a residence should be provided for them.

The suit was heard by the Subordinate Judge of Dacca, who on the 16th April, 1917, gave judgment for the plaintiffs (the present appellants) for the arrears of maintenance allowances and costs, but disallowed the claim for a residence.

On appeal by the defendants to the High Court at Calcutta, that Court, on the 6th June, 1919, gave judgment allowing the appeal and dismissing the appelleants' suit with costs. The reasons given by the Court for their decision were briefly :—

(1) that on the authority of the cases above cited (to which may

be added *Maulpi Sayyid Muhammad Ali v. Razia Bibi and others* (1), the *wakfs* of 1846 and 1868 were invalid ;

(2) that they were not validated by the Mussulman Wakf Validating Act, 1913, which is not retrospective ; and

(3) that the agreements of 1881, being founded upon and inseparably associated with the *wakfs* of 1846 and 1868, fell with those *wakfs*.

Against this judgment the present appeal was brought.

In the argument before their Lordships there was no serious dispute as to the above propositions numbered (1) and (2). There can be no doubt that, having regard to the decisions of the Board above referred to, the deeds of 1846 and 1868, which purported to create by gift a perpetual succession of interest for the aggrandisement of the family of the donors, were invalid by the Mahomedan law and were not validated by the use of the term "*wakf*" or by the insertion of a remote trust for the poor ; nor can the Act of 1913 be construed as validating deeds executed before its date. The real question to be determined, therefore, is whether the High Court was right in holding that, the deeds of *wakf* being invalid, the scheme of maintenance allowances contained in the agreements of 1881 also fell to the ground. The conclusion of the learned Judges of the High Court to that effect appears to have been based upon the view that the scheme of 1881 was founded upon and inseparable from the illegal *wakfnamas* and could not be supported by the Court without also supporting a family settlement which is contrary to Mahomedan law. They appear to have assumed, on the authority of the decision of the Board in *Lakshmi Narayana Ananga Garu v. Madhawa Deo Garu* (2), that if the maintenance allowances had been charged on the property they might have been upheld as heritable allowances ; but they held that the parties to the agreements could not have intended to create a charge on property which they were dedicating to religious purposes, and accordingly that no charge was created.

With great respect to the learned Judges who came to that conclusion, it appears to their Lordships to give too little weight to the essential differences between the two deeds of *wakf* on the one hand and the agreements of 1881 on the other. The deeds of *wakf* were invalid because they attempted to create a perpetual succession of estates contrary to Mahomedan law, and the attempt was not validated by giving to the settlements a colour of charity ; but the main purpose of the agreements of 1881 was quite different. The prin-

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(1) (1905) L. R. 32 I. A. 86.

(2) (1892) L. R. 20 I. A. 9.

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principal purpose of those agreements was to secure to living and named persons certain fixed allowances which were to become payable immediately and were to be continued to their heirs. It is true that the agreements purported to confirm the *wakfnamas*, and that the allowances were made payable by the hand of the *mutwali* of the *wakfnamas* out of the income accruing to him from the properties thereby settled; but the allowances were intended to take effect as immediate and heritable charges on such incomes taking priority of all the limitations contained in the settlement, and they may, therefore, be supported although those limitations fail. The direction to pay the allowances "out of the income" of the settled properties, which appears in both agreements, shows an intention to create a charge, and this intention was not frustrated by the ineffectual attempt to keep alive the subsequent and invalid limitations of the settlements.

There is a further difference between the two sets of documents which is also of importance. The *wakfnamas* were gifts and were, therefore, subject to the rule of Mahomedan law which requires that a gift shall be accompanied by delivery; but the agreements of 1881 are not gifts, but contracts for valuable consideration. By those agreements the members of the family other than Sir Abdul Gani and his son Ahsanullah surrendered their claims to property of considerable value and stayed their suit in consideration of a firm contract securing to them annuities to an amount exceeding 1,30,000, and continuing such annuities to their heirs. Such an agreement if made for valuable consideration is not subject to the restrictions affecting gifts among Mahomedans, but is a contract creating a charge on lands, which may be enforced like other charges by the Courts. The provision contained in the agreements that the distribution of an annuity among the heirs of the annuitant should be in proportions to be determined by the family *panchayet* (if it was intended to do more than to authorize the *panchayet* to settle disputes as to heirship) may be disregarded, the more so as no *panchayet* has functioned for many years past. This view is in accordance with the decisions of the Board in *Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum and others* (1); *Lakshmi Narayana Ananga Garu v. Madhawa Deo Garu* (2); *Khwaja Muhammad Khan v. Husaini Begam* (3); and *Raja of Ramnad v. Sundara Pandiyasami Tevar* (4); and it appears to their Lordships that it should prevail.

(1) (1867) 11 M. I. A. 517 (548).

(2) (1892) L. R. 20 I. A. 9.

(3) (1910) L. R. 37 I. A. 152.

(4) (1918) L. R. 46 I. A. 64.

It is satisfactory that the above conclusion as to the law applicable to the case corresponds with the justice of the matter. It would be lamentable if the heirs of Ahsannullah, who in 1881 was confirmed in the possession of valuable properties as *mutwali* only and on a clear agreement for the payment out of the income of such property annuities to the members of the family and their heirs were now at liberty to repudiate the fiduciary character of that possession and the conditions on which it was given and to keep the property in their own hands free from all charges. It is consistent not only with law, but with "equity, justice and good conscience," that the agreements should be observed.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed and that the judgment of the Subordinate Judge should be restored, the respondents to pay the costs in both Courts and the costs of this appeal.

T. L. Wilson & Co : Solicitors for Appellants.

Morgan, Price, Gordon and Marley : Solicitors for Respondents.

K. V. L. N.

Appeal allowed.

PRESENT : *Viscount Cave, Lord Shaw, Lord Phillimore, and Sir John Edge.*

AMULYA CHANDRA BANERJEA AND OTHERS

v.

THE CORPORATION OF CALCUTTA.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Calcutta Municipality—Power of Corporation to acquire surplus land—“Dharmasala,” a public purpose—Calcutta Municipal Act (III B.C. of 1899), Ss. 14, 357, 556.

A “Dharmasala” is not excluded from the term “public purpose.” Under the Calcutta Municipal Act, the Corporation of Calcutta has power to acquire surplus lands in any area for the purpose of erecting a “Dharmasala” for the use and convenience of pilgrims crowding to a Hindu temple within the area.

Under sections 14 and 556 of the Calcutta Municipal Act, the discretion is vested in the Municipality and not with a Court of law.

Appeal from a decree of the Calcutta High Court (N. Chatterjea and Panton JJ.) affirming a decree of the District Judge of 24-Parganas, which reversed a decree of the Subordinate Judge of 24-Parganas.

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The respondent Corporation of Calcutta, by their resolutions, dated the 12th August, 1914 and the 26th May, 1915, intended to acquire premises Nos. 92 to 92 (4), Kalighat Road, belonging to the appellants and construct a colonnaded "Dharmasalas" thereon.

The appellants brought the suit for a declaration that the Corporation of Calcutta is not competent to acquire their property and for a permanent injunction against their doing so. The Subordinate Judge of 24-Parganas who tried the suit, granted the prayer holding that the property was "surplus" land and that the "Dharmasala" was excluded from the term "public purpose." He passed a decree in favour of the appellants. On appeal the District Judge of 21-Parganas reversed this decree and dismissed the appellants' suit holding that the declaration of the Governor was conclusive. The High Court, on further appeal, affirmed the decision of the District Judge, though they did it on another ground, namely, that the action of the Municipality was within their powers under sections 14 and 556 of the Act. The present appeal is preferred from that decree of the High Court by the plaintiffs. The other facts and the sections of the Act are fully set out in their Lordships' judgment.

De Gruyther K. C. and *Brown* for Appellants: The trial Judge is right. "Dharmasala" is only for the use of the worshippers and dignitaries of the temple and cannot be included in the term "public purpose." The acquisition of the neighbouring lands is for the purpose of widening the roads and is therefore within the powers of the respondent Corporation. The premises that are now sought to be acquired is clearly "surplus land" and the appellants have a power to retain it on a certain payment as provided in section 357 of the Act: they are desirous of exercising that power.

Dunne K. C. and *Hyam* for the Respondents: There was no suggestion in any of the Courts that the appellants were desirous of exercising the option given by the Act and they had taken no steps for that purpose. Under the Act, the corporation has very wide powers for acquiring lands within the city. Even if the acquisition of this land does not actually come within the powers of the corporation under sub-clauses (ii) and (v) of section 14, it is clearly within the ambit of sub-clause (xi) of the said section. The last clause clearly leaves the discretion to the corporation and the Courts of law are not to interfere with that discretion.

De Gruyther K. C. replied.

C. A. V.

The judgment of their Lordships was delivered by

Lord Shaw : This is an appeal from a decree, dated the 27th February, 1920, of the High Court of Judicature at Fort William in Bengal in its Appellate Civil Jurisdiction affirming a decree of the District Judge of 24-Pargannas dated the 12th March, 1919, which reversed a decree of the Subordinate Judge of that district dated the 13th December, 1917.

The suit was brought by the present appellants for a declaration that the Municipality of Calcutta "is not competent, according to law, to acquire" certain property, and for a permanent order of injunction against their doing so.

The duties and powers of the Corporation as far as this case is concerned are contained in the Calcutta Municipal Act (Bengal Act III of 1899). The piece of land which is the subject of this suit is said by the Corporation to lie in "the very congested and insanitary area surrounding the ancient and famous Temple of the Goddess Kali of Kalighat." The area was added to and incorporated in Calcutta by the Bengal Act II of 1888. The condition and development of this area have been under the consideration of the Corporation for several years past. From the plans produced before the Board, it is clear that a system, *inter alia* of widening of roads, involving the acquisition, and thereafter, the demolition of various buildings is in process of being carried out there.

On the 12th August, 1914, the Corporation passed the following resolution :—

"(1) That the proposed 20-foot road on the north of the passage leading to the gate of the Temple be constructed in the place of the 40-foot road originally proposed over the site of Sham Roy's Temple and that the rest of the road be made 40 feet wide as proposed.

"(2) That surplus land be acquired as shown on the plan.

"(3) That the estimate amounting to Rs. 77,330 be sanctioned.

"(4) That in addition to the surplus lands included in the estimate amounting to Rs. 77,330, the whole of the premises Nos. 92 to 92 (4) Kalighat Road be also acquired, and that the additional sum required for the purpose be reported to the Corporation at their next meeting."

On the 26th May, 1915, the following further resolution was passed :—

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"(1) That the scheme for the construction of a colonnaded Dharmashala at a cost of Rs. 28,000 on the land to be acquired at Nos. 92 to 92 (4) Kalighat Road, and a Dispensary at a cost of 15,000 on the land acquired on the north of the 60-feet road near the Kalighat Police Out-post, be sanctioned."

To these resolutions this explanation may be added. In the area there stands the temple referred to—viz, that of Kali, the Goddess of Destruction. There resort to it at certain seasons of the year large numbers of worshippers, who crowd into this part of the city. They come from various parts of India, and their presence in such large numbers involves the provision of suitable and decent accommodation, and the avoidance of inconvenience or of danger to life or health. These inconveniences and dangers, to themselves and to the ordinary resident population, have required and obtained consideration at the hands of the Municipality.

The scheme which was formulated and is disclosed in these proceedings included the construction of roads adjoining the Temple of Kali. The property of the appellants is in the neighbourhood of that temple and consists of a square block of land with buildings upon it. The scheme involved the construction of a 20-foot road running north and south, cutting off a large eastern slice from the appellants' land adjoining the temple, which lies to the east. Another 20-foot road cut off a considerable slice of its western side, and was added for the widening of an existing narrow road. It cannot be denied that these slices, in so far as the scheme was a road construction or widening scheme, fell within the powers of the Municipality. Section 357, after quoted, covers that case.

The remainder of the appellants' block thus forms a central plot within the two roads referred to. It was surplus land, and the Corporation had over it such powers of acquisition as the statute conferred.

As it turned out, a philanthropist was willing, out of his own private resources, to pay the expenses of constructing upon the plot a Dharmashala, being a hostel or rest house with proper sanitary and other suitable accommodation, so that the needs of pilgrims and visitors, and particularly the worshippers of Kali, during the period of overcrowding and danger already mentioned should so far be met. There can be no doubt that the principal object of the acquisition by the Corporation of this land was to enable the city of Calcutta to become the possessor of this great public addition to its municipal resources and advantages.

The appellants, however, challenge the right of the Corporation

to acquire the land compulsorily. The challenge was successful before the Subordinate Judge. Before the statutes are cited it is necessary to say that their Lordships fundamentally disagree with the proposition upon which his judgment is rested, viz., that the dharamshala is excluded from the term "public purpose" because the persons mainly interested would have been the worshippers and dignitaries of the temple. What the Municipality had to consider was not the religious beliefs and purposes of those assembling in such numbers, but what was the situation of the city in respect to this assemblage and to the citizens at large in view of the general questions of public convenience, proper sanitation, and the prevention of danger and disease. Any enlightened Municipality would carefully attend to these questions and endeavour to avoid the evils referred to. This is not to be ruled out by a consideration as to the particular form of belief or practice of those who would primarily benefit by the improvements made.

But, of course, the question of powers under the statute remains.

The following sections of the Act are material :—

"Section 14. In addition to the other duties and powers conferred or imposed on them by or under this Act or any other Act for the time being in force . . . the Corporation may, in their discretion, provide from time to time, either wholly or partly, for all or any of the following matters :

(ii) The construction, alteration, maintenance and adornment of public halls, offices and other buildings under the control of the Corporation or required for municipal purposes ;

(v) The construction and maintenance of hospitals and almshouses ;

(xi) Any other matter which is likely to promote the public health, safety, or convenience or the carrying out of this Act."

By Section 357 it is provided :—

"(1) The Chairman, with the approval of the Corporation, may acquire any land required for the purpose of opening, widening, extending or otherwise improving any public street, or of making any new public street, and the buildings (if any), standing upon such land.

"(2) The Chairman, with the approval of the Corporation and the sanction of the local Government, may acquire, in addition to land and buildings acquired under sub-section (1), any land outside the proposed street alignment, with the buildings, if any, standing thereupon, which the Corporation may, in the exercise of any

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of the powers conferred by sub-section (1), consider it expedient to acquire ;

" Provided that, in any case in which it is decided to acquire any land under this sub-section, the owner of such land may retain it by paying to the Corporation an annual sum to be fixed by the General Committee in that behalf, or a lump sum to be fixed by the General Committee, not being less than twenty-five times such annual sum."

It was stated that the appellants, as owners of the land, were desirous of exercising any power of retention by payment as provided for in this section, although they had not yet taken any steps for that purpose.

By Section 556 it is provided :—

" Section 556.—In addition to the powers expressly conferred on any municipal authority by any other Chapter of this Act for acquisition and disposal of land or buildings, the Corporation may—

" (1) Acquire, or pay rent for, or take on lease under such conditions as they may think fit, any land and buildings, whether situated in Calcutta or not, which may in their opinion be needed for carrying out any of the purposes of this Act."

It is unnecessary to enter into the various points which are raised upon the statutes, and commented on in the judgments of the Court below, other than the one now to be mentioned. Their Lordships are clearly of opinion that the judgment of the High Court is right in one matter which is fundamental, and is entirely sufficient to dispose of the case.

In their Lordships' opinion, section 556 of the statute plainly confers upon the Corporation power to acquire land and buildings which are, in their opinion, necessary for carrying out any of the purposes of the Act. This refers back to, *inter alia*, the various cases in section 14. Those cited in argument are three in number viz. : (ii) the construction and maintenance of buildings under the control of the Corporation or required for municipal purposes, (v) the construction and maintenance of hospitals and almshouses ; but there further remains, after a large category of no fewer than ten different items with much variety, sub-section (xi) : " any other matter which is likely to promote the public health, safety or convenience, or the carrying out of this Act."

It may be true that the acquisition of this block of land for a dharamshala would not fall under (ii) as being for a building under the control of the Corporation, or even under the general denomina-

tion of hospitals or almshouses in (v) ; but upon these nothing need be said, for their Lordships are clearly of opinion that the construction and maintenance of a dharamshala cannot be said to be ruled out of (xi), which covers "any other matter which is likely to promote the public health, safety or convenience or the carrying out of this Act." This being so, their Lordships would be the last to question the opinion of, or the exercise of discretion by, the Municipality of Calcutta, even if they differed from it, which they certainly do not. The Act by section 14 and section 556 has expressly placed the discretion, not with this Board or with a Court of law, but with the municipality itself. The Corporation has the power of acquisition of land which may in their opinion be needed for carrying out any of the purposes of the Act. The resolutions come to clearly enough express that opinion. And the matter is thus at an end.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Watkins & Hunter : Solicitors for the Appellants.

Orr, Dignam & Co : Solicitors for the Respondent.

K. V. L. N.

Appeal dismissed.

PRESENT : *Viscount Cave, Lord Shaw and Sir John Edge.*

SYED KASAM (DECEASED) REPRESENTED BY SYED KHANE
JAMA AND OTHERS,

v.

JORAWAR SINGH AND OTHERS.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER,
CENTRAL PROVINCES.]

Hindu Law—Mitakshara joint family in Berar—Claim of share by one member—Agreement appointing an arbitrator to partition—Severance of status—Alienation—Right of purchaser of undivided share—Agreement not set up—Plea, if can be subsequently raised.

The Mitakshara is to be interpreted in Berar in the same manner as in Bombay. A member of a joint family in Berar can alienate his undivided share without the consent of his co-sharers.

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In the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place; and the commencement of a suit for partition is sufficient to effect a severance in interest even before decree.

Where a member of a joint Hindu family claims a partition and the members sign an agreement appointing an arbitrator to divide the properties, the claim and the agreement effect a severance of the joint family status: *Appovier v. Rama Subba Aiyar* (1); *Joy Narain v. Grish Chunder* (2); *Girja Bai v. Sadashiv Dhundiraj* (3); *Kamal Narain v. Prabhu Lal* (4), applied.

Although agreement effecting severance of the joint family was not pleaded and the defendant pleaded that the vendor was separate in estate:

Held, that the agreement leading up to the division could not be put out of account. As the subsequent division of the property between the co-owners was accepted by all parties and was not said to be unfair, the sale to the appellant could not be set aside at the instance of the joint owners, but only (if at all) at that of the vendor or his representatives.

Appeal from a decree of the Court of the Judicial Commissioner of the Central Provinces, reversing a decree of the Additional District Judge, East Berar, Amraoti.

Nain Singh and the respondents were members of a joint Hindu family in Berar. They became separate in mess and residence sometime before 1902 but remained joint in estate. In 1902 Nain Singh sold his undivided half share to the appellant. In 1905, all the members of the family signed a Kararnama appointing one Ghasi Ram as arbitrator to divide the properties and agreeing to accept the division made by him. The division was effected and the property to be allotted to Nain Singh was later delivered to the appellant purchaser. There was no formal division as Nain Singh died early in 1906.

On the 23rd July, 1914, the respondents brought the present suit against the appellant purchaser for the recovery of the property sold to him by Nain Singh in 1905, on the ground that the family continued joint in estate to the death of Nain Singh and that the property passed to them on the death of Nain Singh's widow in 1910. The Additional District Judge of East Berar dismissed the suit holding that there had been an effective agreement for partition and that there was a severance of the joint family status. On appeal, the Judicial Commissioner reversed the decree of the trial

(1) (1866) 11 M. L. A. 75; 8 W. R. P. C. 1.

(2) (1878) L. R. 5 I. A. 228.

(3) (1916) L. R. 43 I. A. 151; I. L. R. 43 Calc. 1031; 24 C. L. J. 207.

(4) (1917) L. R. 44 I. A. 159; I. L. R. 39 All. 496; 26 C. L. J. 101.

Judge on the ground that the consideration money was not paid and that the plea of severance of the joint status was not specifically raised by the defence. A decree was passed directing delivery of the property on payment of Rs. 5,000 which was found to have been paid to Nain Singh. Hence the appeal by the plaintiffs.

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De Gruyther K. C. and Parikh for the Appellant: The decree of the Judicial Commissioner is wrong. As soon as the agreement of 1905 was signed the family became separate in status. It was an unequivocal expression of intention to separate: *Girja Bai v. Sadas Shiv* (1); *Kawal Narain v. Prabhu Lal* (2). Further the division effected by the arbitrator was acted upon by putting the purchaser in possession of the property allotted to his vendor. Apart from this, Nain Singh had a right to sell his undivided share under the Mitakshara law as interpreted in Berar: *Ramprasad v. Subu Bai* (3); *Bhadia v. Bhagi* (4). The interpretation is in the same manner as in Bombay: *Suraj Bunsu Koer v. Sheo Pershad* (5). No fraud being found, the sale cannot be set aside.

Kenworthy Brown for the Respondents: The appellant never raised the defence that the agreement of 1905 effected a severance of the joint family nor was it made out at the trial. The Judicial Commissioner rightly rejected that plea. Moreover what took place in 1905 did not effect a separation. The authorities show that when an agreement is relied upon to prove separation it must show a clear intention to hold the property separately from that time: *Appovier v. Rama Subba* (6); *Joy Narain v. Girish Chunder* (7). The intention has to be expressed in unequivocal terms: *Suraj Narain v. Ikbai Narain* (8). The later decisions of the Board do not in any way modify the result of the above decisions. In this case the agreement does not show that it should be operative before the division by metes and bounds took place. The evidence is that Nain Singh died soon after and the division was not proceeded with. The family being thus undivided on the date of Nain Singh's death the sale becomes a nullity: *Sahu Ram Chandra v.*

(1) (1916) L. R. 43 I. A. 151; I. L. R. 43 Calc. 1031; 24 C. L. J. 207.

(2) (1917) L. R. 44 I. A. 159; I. L. R. 39 All. 496; 26 C. L. J. 101.

(3) (1908) 4 Nag. L. R. 31.

(4) (1913) 10 Nag. L. R. 24.

(5) (1878) L. R. 6 I. A. 88; I. L. R. 5 Calc. 148; 4 C. L. R. 226.

(6) (1866) 11 M. I. A. 75; 8 W. R. P. C. 1.

(7) (1878) L. R. 5. I. A. 228.

(8) (1912) L. R. 40 I. A. 40; 17 C. L. J. 288.

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Bhup Singh (1). To escape this the appellant must show that Hindus in Berar are governed by a modification of Mitakshara. The Bombay cases cited are based upon the view that a *bona fide* purchaser for valuable consideration has a right in equity to call for a partition. Here the purchaser paid only Rs. 5,000 of the price. Further the right in equity is only personal to the vendee and it cannot be relied upon after his death: *Manjaya v. Shanmuga* (2); *Maharaja of Bobbili v. Venkataramanujulu* (3).

De Gruyther K. C. in reply: Although the agreement of 1901 is not specifically pleaded, it was asserted that Nain Singh was separate. Even a parol agreement to hold in specific shares effects a separation: *Parbati v. Naunihal Singh* (4).

The judgment of their Lordships was delivered by

April, 6.

Viscount Cave: This is an appeal by the defendant in the suit against the decree of the Court of the Judicial Commissioner of the Central Provinces, reversing a decree of the Additional District Judge, East Berar, Amraoti, and giving judgment for the plaintiffs.

Nain Singh and the plaintiffs, who were the issue of his brother Khannu Singh, formed at one time a joint Hindu family, resident in Berar and subject to the law of the Mitakshara as there interpreted. Before the date of the deed next mentioned, Nain Singh and the plaintiffs had become separate in mess and residence, but not in estate.

By registered sale-deed dated the 29th September, 1902, Nain Singh sold his half share of the ancestral property of the family (with some movable property) to Syed Kasam for 20,000 rupees, of which 15,000 rupees were admitted by the vendor to have been received in advance, and the remaining 5,000 rupees were paid to him in the presence of the registering officer. No partition was then effected, but the purchaser was allowed to hold and cultivate certain parts of the property corresponding in value to a half share. On the 4th December, 1905, all the members of the family signed a *kharinama* appointing one Ghasi Ram as arbitrator to partition the property and agreeing to accept whatever partition he might make. The arbitrator divided the property into two lists, one (representing a moiety in value) containing the property to be allotted to Nain Singh, and

(1) (1917) L. R. 44 I. A. 126; 26 C. L. J. 1.

(2) (1913) I. L. R. 38 Mad. 684.

(3) (1914) I. L. R. 39 Mad. 265.

(4) (1909) L. R. 36 I. A. 71; I. L. R. 31 All. 412; 10 C. L. J. 121.

the other (representing the remaining moiety in value) containing the property to be allotted to the plaintiffs. The latter list was apparently divided into three sub lists, one for each of the plaintiffs. These lists were handed to Nain Singh. The formal division was not at once carried out, as Nain Singh died on the 26th March, 1906; but after his death the lists appear to have been acted upon by all the persons interested, as the purchaser was put into possession of the property allotted by the arbitrator to Nain Singh, and the plaintiffs from time to time dealt with various parts of the lands contained in their lists.

On the 23rd July, 1914, the plaintiffs brought the present suit against Syed Kasam, claiming possession of the lands of which he had been so put into possession on the ground that the family had continued joint in estate down to the death of Nain Singh, and that on the death of Nain Singh's widow (which occurred on the 10th July, 1910) the property had passed to them. They also alleged that the half share had been sold by Nain Singh to the defendant "for a bogus consideration of 20,000 rupees"—an expression which has no legal signification, but which apparently meant that the consideration of 20,000 rupees had not in fact been paid.

The suit was heard by the Additional District Judge, East Berar, who dismissed it, holding that there had been an effective agreement for partition, and that the 20,000 rupees had been paid. On appeal, the Additional Judicial Commissioner held that there had been no partition, and that although 5,000 rupees, part of the purchase money, had been paid before the registering officer, the balance of 15,000 rupees had not been paid, or if paid, had been at once returned. He declined to admit the plea that the *kararnama* effected a severance of the joint tenancy on the ground that this had not been specifically pleaded. He therefore set aside the decree of the lower Court, and directed the defendant to put the plaintiffs in possession of the property in suit on payment by the plaintiffs of 5,000 rupees. Against this decree the present appeal was brought. The original appellant, Syed Kasam, has died pending the appeal, and is represented by the present appellants.

Two points are taken on behalf of the appellants: First, it is said that the law of the Mitakshara is to be interpreted in Berar in the same manner as in Bombay, and that according to that law as so interpreted Nain Singh had power to sell his undivided share in the joint family property without the consent of his co-owners; and their Lordships do not doubt that this statement is correct. But to this point it was answered by the Judicial Commissioner that the

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sale by Nain Singh in 1902 only gave to the purchaser an equity to enforce a partition, and that such equity was displaced by the fact that the purchase money was not fully paid. In view of their Lordships' opinion on the second question, to be hereafter stated, and of the fact that the evidence on the question of the payment of 15,000 rupees was not fully brought to their notice, they do not think it necessary to deal with this point; nor do they express any opinion on the question whether, even if it was proved that part only of the purchase money was paid, the form of decree adopted by the Judicial Commissioner was appropriate to the case.

But, secondly, it is argued on behalf of the appellants that the transactions which took place in the year 1905 effected a severance of the joint estate, and accordingly the plaintiffs have no right to sue; and in their Lordships' opinion this argument should prevail.

It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place; and the commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree: see *Appovier v. Rama Subba Aiyar and others* (1); *Joy Narain Giri v. Grish Chunder Myti* (2); *Girja Bai v. Sadashiv Dhundiraj and others*, (3); *Kawal Nain and others v. Prabhu Lal and others* (4).

In the present case it was proved by the evidence of one of the plaintiffs (Jorawar Singh) and of Ghasi Ram that Nain Singh claimed his half share of the ancestral property, and that after discussion all the joint holders signed the agreement of the 4th December, 1905, appointing Ghasi Ram to partition the property and agreeing to accept whatever partition he might make; and this claim and agreement were quite sufficient to effect a severance in interest and to prevent the share of Nain Singh from passing by survivorship. It is true that the agreement was not specifically pleaded by the defendant Syed Kasam; but he pleaded that Nain Singh was separate in estate, and relied in his written statement on the division of the property which resulted from the agreement, and their Lordships do not think that the agreement leading up to that division can be put out of account. The subsequent division of the pro-

(1) (1866) 11 M. L. A. 75.

(2) (1878) L. R. 5 I. A. 228.

(3) (1916) L. R. 43 I. A. 151.

(4) (1917) L. R. 44 I. A. 159.

party between the co-owners was accepted by all parties and is not said to have been unfair; and there appears to be no reason why it should be disturbed. In these circumstances the sale to Syed Kasam could not be set aside at the instance of the joint owners, but only (if at all) at that of the vendor or his representatives; and any proceedings for that purpose were statute barred before the commencement of the suit. This is sufficient to dispose of the plaintiffs' claim.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the Judicial Commissioner should be set aside and the decree of the District Judge restored, and that the respondents should pay the costs in both the Courts below and the costs of the present appeal.

E. Dalgado : Solicitor for the Appellants.

Dowder & Johnson : Solicitors for the Respondents.

K. V. L. N.

Appeal allowed.

PRESENT : Lord Shaw, Lord Phillimore, Sir John Edge and
Mr. Ameer Ali.

CHET RAM AND OTHERS

v.

RAM SINGH AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
ALLAHABAD.]

*Hindu Law—Joint family property Mitakshara—Alienation by a member—
Usufructuary mortgage and subsequent sale to mortgagees—Antecedent debt
—Pious obligation to pay grandfather's debts.*

A member of a joint Hindu (Mitakshara) family executed a usufructuary mortgage and three years later sold the equity of redemption to the mortgagee. No necessity for either transaction was made out nor was it proved that the money was spent for immoral purposes. After his death, but during the life of his sons, the grandsons sued to recover the property from the vendee :

Held, that there was no antecedent debt to justify either the mortgage or the subsequent sale, that the alienation is not binding on the plaintiffs and that they are under no pious obligation to pay the vendee the

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money that their grandfather received : *Sahu Ram v. Bhup Singh* (1) ; *Mahdo Pershad v. Mehrban Singh* (2) ; *Lachman Pershad v. Surnam Singh* (3) ; *Chandradeo Singh v. Mata Prasad* (4), affirmed by the Board (5), followed.

Appeal from a decree of the Allahabad High Court, modifying a decree of the Subordinate Judge of Meerut.

In 1904, Amar Singh, a member of a Hindu (Mitakshara) joint family consisting of himself, his two sons and grandsons, executed a usufructuary mortgage over a part of the joint property in favour of the appellants for Rs. 8,000. In 1907, he sold the same property to the mortgagee for a consideration of Rs. 13,500. After discharging the mortgage debt, the balance of Rs. 5,000 was paid over to Amar Singh. In 1909 Amar Singh died.

The suit was brought on the 24th July, 1915, by the grandsons of Amar Singh during the lifetime of his sons for recovery of possession of the property sold by Amar Singh. It is not denied that the property was ancestral in the hands of Amar Singh and that the two sons and the plaintiffs were all alive on the date of the mortgage as well as sale. The other facts are set out in their Lordships' judgment.

The trial Judge found that there was no legal necessity for the mortgage and the sale. He however thought that, for the sale, there was justification as there was an "antecedent debt" at the time. He upheld the sale to the extent of $\frac{1}{4}$ share of the property. He ordered that the plaintiffs do get $\frac{3}{4}$ share of the property on payment of Rs. 5,500 received by their grandfather as they were under a pious obligation to pay that debt.

On appeal, the High Court varied this decree. The learned Judges (Rafique and Lindsay, JJ.) held that the mortgage of 1904 could not be held to be an antecedent debt to justify the sale of 1907, that under Hindu law, there was no pious obligation on the part of the plaintiffs to pay their grandfather's debt. They however found that Rs. 1,000 was applied towards the discharge of a personal debt of Amar Singh to a Bank at Meerut and directed that the amount should be paid by the plaintiffs before they can recover the property (6). The vendees appealed to the Privy Council. There was no cross-appeal by the plaintiffs as to the Rs. 1,000.

(1) (1917) L. R. 44 I. A. 126 ; 26 C. L. J. 1.

(2) (1890) L. R. 17 I. A. 194 ; I. L. R. 18 Calc. 157.

(3) (1917) L. R. 44 I. A. 163 ; 26 C. L. J. 97.

(4) (1909) I. L. R. 31 All. 176.

(5) (1917) L. R. 44 I. A. 126 (133) ; 26 C. L. J. 1 (10).

(6) (1919) I. L. R. 41 All. 525.

De Gruyther K. C. and *Hyam* for the Appellants : *Sahu Ram v. Bhup Singh* (1) is only authority for the proposition that the sale cannot be binding when there was no antecedent debt but it does not touch the principle that the creditor could enforce a sale of ancestral property in execution so as to bind the shares of sons and grandsons. That is a well established principle : *Muddun Thakoor v. Kantoo Lall* (2) ; *Suraj Bunsu Koer v. Sheo Pershad* (3) ; *Nanomi v. Modun Mohun* (4) ; *Bhagbut Pershad v. Girja Koer* (5) ; *Badri Prasad v. Madun Lal* (6) ; *Ramasami Nadan v. Ulaganatha Gowndan* (7) ; *Govind v. Sakharam* (8). The principle is based upon the pious obligation of sons and grandsons to pay the debts of their father and grandfather out of the family assets. The texts are clear that the grandsons are bound as well as the sons, even where their fathers are alive : Sircar's *Vyavastha Chandrica*, Vol. I. pp. 238 240. This view is specifically stated in the judgment of Westropp C. J. approved by the Board in *Suraj Bunsu Koer v. Sheo Pershad* (3). *Narain Prasad v. Surnam Singh* (9) and *Jogi Das v. Ganga Ram* (10) do not touch the question. There was no evidence that the debt was incurred for immoral purposes. The sale cannot be set aside in equity without the money being refunded : *Muddun Gopal v. Ram Buksh Pandey* (11). Further the sale is to pay an antecedent debt constituted by the previous mortgage. *Sahu Ram v. Bhup Singh* (1), merely decided that a debt which was part of the same transaction as the impeached alienation was not "antecedent" to it. This is the view of that decision taken by the High Court at Madras : *Peda Venkanna v. Sreenivaseea Dakshi Thulu* (12) ; *Arumugam Chetty v. Muthu Koundan* (13) ; *Kandasami Goundan v. Kuppu Mooppan* (14).

Dunne K. C. and *Dube* for the Respondents : *Sahu Ram v. Bhup Singh* (1) is conclusive on the present question. Independently of the security of the joint property there was no debt. Also the mortgage was a usufructuary mortgage without power to sue for ten

(1) (1917) L. R. 44 I. A. 126 ; 26 C. L. J. 1.

(2) (1871) L. R. 1 I. A. 321 ; 14 B. L. R. 187.

(3) (1878-9) L. R. 6. I. A. 88 ; I. L. R. 5 Calc. 148.

(4) (1885) L. R. 13 I. A. 1 ; I. L. R. 13 Calc. 21.

(5) (1888) L. R. 15 I. A. 99 ; I. L. R. 15 Calc. 717.

(6) (1893) I. L. R. 15 All. 75 F. B.

(7) (1898) I. L. R. 22 Mad. 49.

(8) (1904) I. L. R. 38 Bom. 383.

(9) (1917) L. R. 44 I. A. 163 ; 26 C. L. J. 97.

(10) (1917) 21 C. W. N. 957 P. C.

(11) (1866) 6 W. R. 71.

(12) (1917) I. L. R. 41 Mad. 136.

(13) (1919) I. L. R. 42 Mad. 711 F. B. (14) (1919) I. L. R. 43 Mad. 421.

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years. The argument about pious obligation was advanced in *Sahu Ram's Case* (:) and failed. The pious obligation cannot be extended to grandsons during their fathers' lives. (At this stage the Board intimated that they do not wish to hear the counsel for the respondents any further).

C. A. V.

The judgment of their Lordships was delivered by

Lord Shaw: This is an appeal from a decree dated the 11th March, 1919, of the High Court of Judicature at Allahabad, which varied a decree dated the 31st March, 1916.

The suit was brought on the 24th July, 1915, in the Court of the Subordinate Judge of Meerut. The plaintiffs were minors and sued through their guardian, Ram Singh.

No pedigree need be given. It is sufficient to bear in mind that Amar Sing succeeded on the death of his father, Nawal Sing, to a half of Nawal's property. This half, thus ancestral family property, was, at the date of the mortgage and sale after mentioned, the joint family property of Amar, of his two sons, Bharat and Kehar, and of Ram, son of Bharat, and Mahabir and Gujraj, the two sons of Kehar. This ancestral joint undivided estate was thus owned by two sons and three grandsons. The two sons as well as the three grandsons, the plaintiffs, were all alive at the date of the mortgage and sale after mentioned, and they are still alive. Amar, the grandfather, died in 1909.

On 23rd March, 1904, Amar executed a mortgage over this family property for Rs. 8,000. It is a fact beyond dispute that Amar, whom the Subordinate Judge finds to have been a man of extravagant habits, not leading a moral life and addicted to drink, incurred this debt for his own personal purposes. It was, with the doubtful exception of Rs. 1,000 to be presently referred to, neither incurred nor used for family purposes or necessity, nor was it an antecedent debt. It was scheduled upon the mortgage as "Received in cash at the village before registration, Rs. 1,000. Cash at the time of registration, Rs. 7,000." (As to the Rs. 1,000, the High Court has allowed it with certain interest as a good charge, and the respondents do not present any cross appeal. The item may accordingly be dismissed from further consideration).

In short, Amar treated the property as his own and violated the well-known rule of the Mitakshara, under which, as clearly laid down in *Sahu Ram Chandra v. Bhup Singh* (1), joint family property

(1) (1917) L. R. 44 I. A. 126; 26 C. L. J. 1.

"cannot be the subject of a gift, sale or mortgage by one coparcener except with the consent, express or implied, of all the other coparceners. Any deed of gift, sale or mortgage granted by one coparcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it, and it stands entirely free of it." This law has been, in substance, repeated again and again. It is in entire accord with the ancient texts. It was accepted law long prior to *Sahu Ram Chandra's* case (1)—a convenient instance being Lord Watson's judgment in *Mahdo Parshad v. Mehrban Singh* (2); and it has been followed by the cases after referred to.

The exception to this rule is where the consideration for the transaction is an antecedent debt of the vendor or mortgagor. And the judgment of Sir John Stanley on this part of the law in *Chandradeo Singh v. Mata Prasad* (3), and expressly affirmed by this Board in 44 I. A. 133, appears to this Board exactly to cover the present case.

Before passing from the mortgage, however, their Lordships desire to note that it was, by its terms, a usufructuary mortgage, and was for the period of ten years running from its date—that is, from 1907-1917. It is stipulated that, possession and occupation being given to the mortgagee—

"The profits of the mortgaged land will be equal to the interest of the amount of mortgage until redemption of the mortgage..... Whenever, after the expiry of ten years, I, the executant, shall have paid the entire amount of mortgage in a lump sum to the mortgagee, I shall get the property mortgaged by me redeemed. I shall not have power to the redemption of the mortgage before the expiry of ten years"

Apparently, however, the profuse scale of the father's personal expenditure continued, and he was again willing to put, or attempt to put, in jeopardy the joint family property. Notwithstanding the ten years' provision of the usufructuary mortgage, he (Amar Singh) within three years from its date—namely, on the 16th July, 1907—sold his equity of redemption in the property to the mortgagees for Rs. 13,500. In the specification of the consideration he "allowed credit" to the vendees for the Rs. 8,000 obtained from the mortgage, and the balance was put down "Received in cash at the time of the registration."

Beyond all question with regard to this latter sum, here was a sale in flat defiance of the law. For what is not pretended to be

(1) (1917) I. L. R. 44 I. A. 126; 26 C. L. J. 1.

(2) (1890) L. R. 17 I. A. 124.

(3) (1909) I. L. R. 31 All. 176 (196).

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any family purpose or necessity, he had improperly and illegally sold the family property ; and such a sale cannot stand.

This case is singularly clear because it is not affected by other considerations such as the property having been publicly sold : there are no rights of execution creditors or auction-purchasers to be considered.

But an argument was submitted, supported by the judgment of the Subordinate Judge, to the effect that although by the rules of the Mitakshara law a mortgage is at its date an invalid deed in so far as purporting to encumber the joint family property, yet when it purports to become the consideration for a sale it then becomes a just and a legal consideration on the principle of "antecedent debt." The family property could not be affected by such an invalid mortgage, but it could be sold next year or next day to the mortgagee for an "antecedent" debt—namely, the mortgage debt itself! Thus by turning the "antecedent debt" simply into a debt "antecedent" to the sale, the whole doctrine of antecedent debt is reduced *ad absurdum*, the principle of the Mitakshara law is circumvented, and the rights of the junior members of a Hindu family are no longer protected but can be easily destroyed. Their Lordships cannot hold that this is in accordance with law. The views of the Board have been expressed quite recently in *Sahu Ram Chandra's* (1) case, and in *Jogi Das* (2), about to be referred to.

As to the matter of the antecedency of debts, it is clear beyond question that the antecedency is antecedency to the mortgage itself. And it is more than that—it is disconnection with the mortgage in fact as well as in time. In no other way can the law of Indian joint family property protect itself against being undermined.

These sentences from *Sahu Ram Chandra's* case (1) may be quoted as particularly applicable to the circumstances of this appeal.

"In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be,

(1) (1917) L. R. 44 I. A. 126 ; 26 C. L. J. 1.

(2) (1917) 21 C. W. N. 957.

it appears to their Lordships to apply, and to apply only, to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him, but are joint family property. In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, namely, that no manager, guardian or trustee can be entitled for his own purposes to dispose of the estate which is under his charge."

The law thus laid down was followed in *Narain Prasad v. Surnam Singh* (1). Further, to employ the resume made by the learned Judges of the High Court—

"The point was again considered by their Lordships of the Privy Council in the case of *Jogi Das v. Ganga Ram* (2), where Lord Haldane interpreted the judgment in the case of *Sahu Ram Chander v. Bhup Singh* (3) as follows:—"In that case it was laid down in effect that joint property could not be alienated as against co-sharers by way of mortgage or otherwise, except for necessity, or for payment of an actual antecedent debt, quite distinct from the debt incurred in the mortgage itself, and that in consequence the transaction in that case could not stand, and it was added that the mere circumstance of a pious obligation does not validate the mortgage."

This body of law is rightly followed and applied by the High Court, and their Lordships fully approve of the judgment delivered.

A separate and protracted argument was laid before the Board to the effect that the respondents, the grandsons of Amar Singh, are not entitled to have their property against his invalid proceedings by reason of "pious obligations." It is sufficient to say that no such doctrine can be invoked in the circumstances of the present case. In *Sahu Ram Chandra's* case (3), a similar appeal to the "pious obligation" doctrine was made during the father's lifetime, and the point was thus dealt with:—

"While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail; and

(1) (1917) L. R. 44 I. A. 163; 26 C. L. J. 97.

(2) (1917) 21 C. W. N. 957.

(3) (1917) L. R. 44 I. A. 126; 26 C. L. J. 1

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the simplest of all reasons may be assigned for this—namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debts may be discharged. In short, responsibility to meet the father's debts is one thing and the validity of a mortgage over the joint estate is quite another thing."

In the present case the doctrine is invoked against grandsons and in the lifetime of sons.

Nothing more need be said. The invocation of the doctrine entirely fails.

Their Lordships will humbly advise His Majesty that the appeal should be refused with costs.

Barrow, Rogers and Nevill: Solicitors for Appellants.

Hy. S. L. Polak: Solicitor for Respondents.

K. V. L. N.

Appeal dismissed.

PRESENT: *Lord Buckmaster, Lord Atkinson, Lord Sumner and Lord Parmoor.*

PRAMATHA NATH ROY

v.

WILLIAM ARTHUR LEE.

P. C.
1922.
May, 12.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Practice—Calcutta High Court Rules Ch. 32, r. 3—Procedure—Appeal from order—Limitation—Exclusion of time requisite for obtaining copy of order—Diligence—Indian Limitation Act (XX of 1908) Sec. 12, Sub-Sec. 2.

On the 30th August, 1918, the appellant presented an appeal against an order made on the 26th July against him but he failed to file, along with his memorandum of appeal, a copy of the order appealed against, which he was required to do under rule 3 of chapter 32 of the Calcutta High Court Rules. The order was not, however, filed till the 3rd September. The appellant did not apply to have the order drawn up and he returned the draft order sent to him on the 7th August only on the 16th August:

Held, that, in computing the time requisite for obtaining copies under section 12, sub-section 2 of the Indian Limitation Act, the conduct of the appellant must

be considered and that the appeal was out of time as he failed to take reasonable and proper steps to obtain the copies required : *Bani Madhub Mitter v. Matungini Dassi and others* (1) explained

Appeal from a decree of the Calcutta High Court (Sanderson C. J. & Chitty J.) in its appellate jurisdiction affirming an order made by Greaves J. in the exercise of the Original Civil jurisdiction of the High Court.*

The respondent obtained a decree against the appellant for a sum of Rs. 27,443, on the 14th February, 1918. The appellant's application to set aside the decree was refused by Greaves J. on the 26th July, 1918. The appellant appealed against the order of refusal and the appeal was dismissed by the High Court as being out of time. The present appeal is against the decree of the High Court in its appellate jurisdiction. The facts and the material dates are fully set out in their Lordships' judgment.

Dunne K. C and *Macaskie* for the Appellant : Under article 151 schedule I of the Indian Limitation Act, the time for an appeal is 20 days from the date of the order appealed against. S. 12, sub-s. 2 of the same Act allows the time requisite for obtaining copies of the order in favour of the appellant. In this case, the order was not filed till the 3rd September and the appeal was filed on the 30th August. There was thus no delay in filing the appeal and the High Court was wrong in holding that the appeal was out of time. The settled practice of the High Court was also in favour of the appellant. Regard must be had solely to the time when the copy of the order was actually obtained : *Bani Madhub Mitter v. Matungini Dassi* (1).

Raikes for the Respondent was not called upon.

The judgment of their Lordships was delivered by

Lord Buckmaster : The appellant in this case is the defendant in a suit which the respondent instituted by a plaint filed on the 24th June, 1916. The various stages in the litigation are set out in detail in the judgment of the Chief Justice in the Appeal Court at Calcutta, and it is unnecessary that they should be repeated. Among these there was a decree made on the 14th February, 1918, decreeing in favour of the respondent and against the appellant the sum of Rs. 27,443. Application made by the appellant to Mr. Justice Greaves to set that decree aside was refused on the 26th July, 1918. The appellant desired to appeal from that refusal, and he produced his memorandum of appeal before the Court on the 30th August of that year, on the eve of the Court rising for the vacation.

* For High Court Judgment see 23 C. W. N. 553.

(1) (1886) I. L. R. 13 Calc. 104 F. B.

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Lord Buckmaster.

By rule 3 of Chapter 32 of the Rules of the High Court of 1914, it is provided that every memorandum of appeal shall be accompanied by a copy of the decree or order appealed from, and with this rule the appellant did not comply. The memorandum of appeal was, however, admitted without the order, subject to all objections that might be raised on the hearing which took place on the 29th of January, 1919. It was then decided by the High Court that the appeal was out of time, and it is from that judgment that the present appeal has been brought. That the notice of appeal was out of time, in fact, is beyond dispute, for the period of appeal is twenty days from the date of the decree or order which it is sought to impeach, and that period expired on the 15th August, 1918. But there is a provision contained in section 12, sub-section 2, of the Limitation Act of 1908, which provides that in computing the time for appeal there shall be excluded the time requisite for obtaining a copy of the decree. The appellant's contention is that the time "requisite" within the meaning of that sub-section is the time which, in the circumstances of the case, is actually occupied in obtaining the decree, and that, so regarded, the time that ought to be deducted here is more than sufficient to rectify the delay.

The facts with regard to that matter are these :—After the order had been made on the 26th July no steps were immediately taken by the plaintiff to have the order drawn up, but after the lapse of four days it was competent to the defendant to apply for that purpose. The four days elapsed and nothing was done. On the 6th August application was made by the plaintiff to have the order drawn up, and on the 7th August the draft of the order was sent to the appellant. The order was simplicity itself, but the appellant only returned the draft on the 16th August. On the 28th August it was signed, and on the 3rd September it was filed by the plaintiff.

Now the learned Judges in the appeal Court have held that in determining what is the requisite time referred to in section 12 of the Limitation Act the conduct of the appellant must be considered, and their Lordships think that in so determining they have rightly regarded the statutory provision. In their Lordships' opinion, no period can be regarded as requisite under the Act, which need not have elapsed if the appellant had taken reasonable and proper steps to obtain the order. In the present case he took none, and the periods between the 30th July and the 6th August, and again between the 7th August and the 16th August, which were within the appellant's control, are sufficiently great to prevent the appellant

had had the benefit of the mortgage, the plaintiff was bound to redeem the mortgage :

Held, that as this contention involved other considerations, it should not be given effect to.

Appeal by the Defendants.

Suit for recovery of possession.

Sir Rash Behary Ghosh, Babus Baidya Nath Dutt and Bhupendra Kumar Ghosh for the Appellants.

Sir B. C. Mitter, Dr. Dwarka Nath Mitter and Babu Samarendra Kumar Dutt for the Respondent.

The judgment of the Court was as follows :

This is an appeal by the defendants against the decision of the Subordinate Judge of Howrah dated the 17th February 1917 decreeing the suit in favour of the plaintiffs. The plaintiffs' suit was to recover possession of an 8 annas share of certain properties, four in number scheduled to the plaint and his claim was resisted on the ground that these properties were included with other properties in a mortgage executed on the 3rd May 1889 by one Nagendra Nath Mallick in favour of one Kedar Nath Kundu Choudhury in respect of which Kedar Nath obtained a decree on the 19th September 1892 under which he brought the mortgaged properties to sale on the 28th April 1899 two of the properties in suit being purchased at the sale by defendants 1-7 and two by one Mohini Nath Mitra who subsequently conveyed these to the defendants.

The properties in suit properly belonged to one Shama Sundari Dassi as her Yautuk stridhan. She died on the 23rd March 1872 leaving her surviving two sons, Jagendra Nath Mullick and Nagendra Nath Mullick, a childless widowed daughter Kailash Kamini and a daughter Krishna Bhabini, the mother of the plaintiff. Shama Sundari left a will dated the 16th March 1872 whereby after appointing her sons Jagendra and Nagendra trustees, she directed them to make proper arrangements for managing and preserving her properties and to pay out of the profits after deduction Government revenue and other expenses the cost of repairs and maintenance of Kailash Kamini and of her daughter-in-law Nistarini (who was the widow of Khagendra Nath a son of Shama Sundari who predeceased her) and the expenses of certain religious observances and ceremonies and directed that the balance of the profits should be appropriated and enjoyed by Jagendra and Nagendra during their life time. The will further provided that on the death of Jagendra

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and Nagendra the son or sons born of their loins who might be alive should be equally and fully entitled to the properties and should possess and enjoy the same. The will further provided that none of the properties should be sold for the son's debts and that they should not be entitled to transfer the same in any way by gifts, sale &c. but that if they desired to do any meritorious work they would be entitled to pay reasonable expenses for the same out of the profits of the properties and that if after starting any meritorious work they died their heirs should be bound to finish the same. The will contained a provision that if the income of the estate was insufficient to pay the Malguzari payable to the Board of Revenue the sons would be entitled to pay the same by mortgaging the properties.

On the 10th December 1872 Jagendra and Nagendra obtained a succession certificate. On the 15th July 1884 Jagendra died childless leaving a widow. On the 17th September 1886 probate of the will of Shama Sundari was granted to Nagendra who on the 3rd May 1889 executed the mortgage already referred to secure sums said to have been previously borrowed to pay Government revenue and sums then borrowed for the same purpose. Nagendra died intestate on the 9th of June 1891 and on the 10th December 1891 letters of administration of his estate were granted to his daughter Giribala. Apparently before the Subordinate Judge the suit proceeded upon the basis that Jagendra and Nagendra acquired absolute interest of Shama Sundari's estate (see the finding of the Subordinate Judge upon the third issue). In the plaint as originally drawn the plaintiff claimed the properties in suit as heir of Jagendra although he subsequently amended his plaint by inserting an alternative claim as heir of Shama Sundari. The Subordinate Judge apparently think that although Jagendra and Nagendra acquired life interests only under Shama Sundari's will their interests were subsequently enlarged into absolute interests by reason of the plaintiff's mother Krishna Bhabini failing to assert her claim as heiress of Shama Sundari after Nagendra's death. How this could affect the plaintiff's claim if otherwise well founded, we find it difficult to understand and it seems to us useless to discuss the finding of the Subordinate Judge on this part of the case. The case for the appellant was based on this finding and if the finding is, as we think, erroneous, many of the arguments raised before us on appeal go.

The real position appears to us to be that upon the true construction of Shama Sundari's will, Jagendra and Nagendra took

only life interests, not absolute interests as the appellant contends and that as Jagendra had no son and Nagendra no son who survived him (his son Jatindra Nath died in February 1891 and thus predeceased him by three months), there was an intestacy after Nagendra's death of the corpus of the estate. If this is the true position as we hold it is, it is not disputed that upon Nagendra's death Krishna Bhabini who had a son, the plaintiff, became the heir to Shama Sundari's estate. This being so upon her death on the 5th September 1908 the plaintiff as heir of his mother and as heir of Shama Sundari became entitled to the estate unless otherwise debarred. The present suit was filed on the 3rd December 1915 and consequently no question of limitation arises but on behalf of the appellant it is urged that as Nagendra was executor and must be deemed to have executed as executor and not as trustee, the mortgage of the 3rd May 1889, the Subordinate Judge was wrong in holding as he has done, that mortgage was invalid as the leave of the Court was not obtained and he is also wrong in holding as he has also done that there was no necessity for the mortgage it being urged before us that the mortgagee was not bound to enquire whether the money was required or not. We think that it is unnecessary to consider either of these questions.

It appears from the decree of the 19th September 1892 in the mortgage suit (see Ex. M3) that the suit was against Nagendra's administratrix his daughter Giribala and that no representative of Shama Sundari was brought on the record. This being so Shama Sundari's estate is not bound and the decree-holder and those claiming under him, that is the appellant, have acquired no title against the heir of Shama Sundari or Krishna Bhabini.

This really disposes of the appeal but the learned vakil for the appellant in reply contended that even if the mortgage decree was not binding on Shama Sundari's estate that inasmuch as the estate had had the benefit of the mortgage the plaintiff was bound to redeem the mortgage. This contention as already stated was raised in reply for the first time, no such contention was raised in the lower Court and it involves other considerations. Firstly we are told the purchaser at the auction sale under the mortgage decree has been in possession for a good many years. It is said from 1901, and that consequently the mortgage debt if it was a charge on the estate has long since been discharged from the rents and profits and secondly it is said that in this suit we are dealing only with four of the mortgaged properties and that if the present contention prevailed they would only be liable to contribute to the mortgage rateably with the

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other properties mortgaged and that there is no evidence to the value of these properties. We do not think that at this late stage we can go into this question and accordingly the appeal fails and must be dismissed with costs.

A. T. M.

Appeal dismissed.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Chotzner.*

RAJ CUMAR MANDAL AND OTHERS

v.

ALI MIA.*

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1922.

June, 2.

Possession, suit for—Suit by Landlord—Land in possession of tenant.

It is open to a landlord, when his title is in jeopardy from the aggression of a third person and where his title may be damaged by a denial of his rights over the land, to bring a suit for the purpose of having his rights declared as against such wrongdoer and for the purpose of being put into possession of the land as against him: *Bisserurt v. Barada* (1) followed.

The plaintiffs were prejudiced by the intrusion of defendant No. 1 into their tenancy. His occupation resulted in the ouster of the real tenant—defendant No. 7. The result was that defendant No. 7 failed to collect rent from his under-tenants and stopped payment of rent to the plaintiffs:

Held, that it was open to the plaintiffs to institute a suit to recover possession of the land by declaration of their title—such possession when recovered from defendant No. 1 to be held by the plaintiffs through defendant No. 7—the tenant who had been dispossessed by the trespasser.

Appeal by the Plaintiffs.

Suit for recovery of possession of land upon declaration of title.

The material facts appear from the following judgment of

Cuming J: The facts of the suit out of which the appeal has arisen are as follows: Jadab Mandal father of plaintiffs Nos. 1 and

* Letters Patent Appeal No. 20 of 1921, against the decision of Mr. Justice Cuming in Appeal from Appellate Decree No. 2330 of 1919, dated the 21st February, 1921 against the decision of Babu Nalini Kanta Bose, Officiating Subordinate Judge, 1st Court, of Faridpur, dated the 2nd August, 1919, reversing that of Babu Asutosh Roy, Munsiff, 1st Court, of Gcalando, dated the 17th June, 1918.

(1) (1883, I. L. R. 10 Calc. 1076.

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2 and *pro forma* defendants 3 and 4 and his brother Pijan Mandal held some lands under two separate jammās.

Pijan Mandal settled his land with *pro forma* defendant No. 6. Jadab died leaving his four sons all minors. During their minority their mother *pro forma* defendant No. 5, settled their land with defendant No. 2. Defendant No. 2 resettled portion of the land with defendant No. 5. Then defendant No. 1 who contests the appeal executed a kabuliāt in favour of defendant No. 5 for a portion of the land resettled with her but the kabuliāt was not accepted.

Defendant No. 2 also settled with defendant No. 7 the land not resettled with defendant No. 5 with the *pro forma* defendant No. 7. He sued the tenant for rent and the suit was dismissed on the ground that Defendant No. 1 held the land (the land in the present suit) under *pro forma* defendant No. 5 ; since then defendants 1 and 2 are in possession. Hence the suit for recovery of possession after declaration of title.

Defendants Nos. 1 and 5 contested the suit. Defendant 2 filed a written statement but took no further part. Defendant No. 1's case was that he had a settlement of the land in suit from defendant No. 5 the widow of Jadab Mandal. The learned Munsif found that the plaintiff had title to the land in dispute but that defendant No. 1 was a tenant of the suit land under the plaintiffs and hence the plaintiffs were not entitled to eject the defendant No. 1. In appeal the learned Subordinate Judge held that defendant No. 1 was not a tenant under the plaintiff but that defendant No. 7 was the tenant under the plaintiff and he ordered that the suit should be decreed in full and that the plaintiff should get possession through defendant No. 7 on ejecting defendant No. 1.

Defendant No. 1 has appealed and his sole contention before me is that so long as the tenancy subsists between the plaintiff and defendant No. 7 the plaintiff is not entitled to khas possession and cannot eject him (defendant No. 1). He contends that he cannot be ejected until the tenancy of defendant No. 1 is determined by Defendant No. 7.

The contention appears to me to be correct. So long as the tenancy between plaintiff and defendant No. 7 subsists plaintiff is not entitled to eject defendant No. 1.

The question is clearly one between defendant No. 1 and defendant No. 7 and until the tenancy is determined plaintiff cannot eject the defendant No. 1.

The appeal must succeed and that portion of the decree of the

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lower appellate Court by which the plaintiff is held to be entitled to eject defendant No. 1 must be set aside.

The appellant is entitled to his costs in all the Courts.

From this decision, the plaintiffs appealed under clause 15 of the Letters Patent.

Babu Sures Chandra Talukdar for the Appellants.

Dr. Sarat Chandra Basak and *Babu Dwijendra Krishna Dutt* for the Respondents.

The judgment of the Court was delivered by

June, 2.

Mookerjee J: This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Cuming in a suit for recovery of possession of land upon declaration of title. The plaintiffs and the first two defendants are four brothers and are interested in the land in equal shares. According to the plaintiffs, the seventh defendant is their tenant and they have been evicted from the land by the first defendant who is a trespasser. The seventh defendant instituted a suit for rent against the under-tenants, with the result that the suit was dismissed, because the first defendant is in wrongful possession of the land. The seventh defendant thereupon stopped payment of rent to the plaintiffs. The plaintiffs were consequently constrained to institute this suit for declaration of title and recovery of possession by ejectment of the first defendant through the seventh defendant. The first defendant pleaded that he held as tenant under the plaintiffs by attornment in favour of their mother, which, according to him, created a tenancy operative against the plaintiffs. The Court of first instance came to the conclusion that this alleged tenancy of the first defendant under the plaintiffs was established and in this view dismissed the suit. Upon appeal, the Subordinate Judge came to the conclusion that the alleged tenancy of the first defendant was not established, but that the land was held by the seventh defendant as tenant under the plaintiffs. The Subordinate Judge thereupon decreed the suit. His decree declared that the plaintiffs had one-half share in the land and also directed that they do get possession through the seventh defendant by ejectment of the first defendant therefrom. On appeal to this Court, Mr. Justice Cuming has held that as there is an outstanding term in the seventh defendant, the plaintiffs are not entitled to a decree for ejectment. In this view, he has allowed the appeal in part and set aside that portion of the decree of the Subordinate Judge which entitled

the plaintiffs to get possession of the disputed land through the seventh defendant on ejectment of the first defendant. On the present appeal, the plaintiffs have contended that the decree made by the Subordinate Judge was correct on principle and should not have been set aside.

The principles applicable to cases of this character have been examined in a long series of decisions. In the case of *Bissesuri Dabeea v. Barada Kanta Roy Chowdhury* (1), Sir Richard Garth C. J. stated that it is open to a landlord, where his title is in jeopardy from the aggression of a neighbouring zemindar and where his title may be damaged by a denial of his rights over the land, to bring a suit for the purpose of having his rights declared as against such wrongdoer and for the purpose of being put into possession of the land as against them. Sir Richard Garth C. J. distinguishes the earlier decision in *Womesh v. Raj Narain* (2), which is in accord with the decision in *Davis v. Kasee Abdool Hamid* (3) and confirms the principle that a landlord's cause of action to recover possession from a tenant or any one claiming under the tenant only accrues from the time when he determines the tenancy, and there can be no limitation or adverse possession as against a landlord so long as the tenancy continues. In the case before us, as in the case before Sir Richard Garth, the plaintiffs have been seriously prejudiced by the intrusion of the respondent into his tenancy. His occupation has resulted in the ouster of the real tenant—the seventh defendant. The consequence has been that the seventh defendant has failed to collect rent from his under-tenants and has stopped payment of rent to the plaintiffs. In such circumstances, the principle enunciated by Sir Richard Garth becomes clearly applicable. This doctrine was recognised in the cases of *Kali Krishna v. Golam Ali* (4), and *Sarat Chandra Singha v. Nritya Gopal Biswas* (5). The same point arose for consideration before a Full Bench in the case of *Sita Ram v. Ram Lal* (6). Sir John Edge, C. J. elaborately discussed the principle applicable to cases of this description and came to the conclusion that "it was open to the landlord to institute a suit for recovery of possession from a trespasser through the intervention of his tenant. A landlord whose title is denied by his tenant has got a right to have the tenancy determined. A landlord whose title is questioned by any one else than the tenant has got a right to a declaration under section 42 of the Specific Relief Act; and if

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(1) (1883) I. L. R. 10 Calc. 1076.

(2) (1868) 10 W. R. 15.

(3) (1867) 8 W. R. 55.

(4) (1886) I. L. R. 13 Calc. 3.

(5) (1910) 13 C. L. J. 284.

(6) (1896) I. L. R. 18 All. 440.

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any one enters on the receipt of the rents and profits of the land and takes from his tenants the rents which were due to him, he is entitled as against such person, not only to a declaratory decree declaring his title and that the other person has no title, but to a decree putting him into possession, that is, what is known as formal possession as contradistinguished from actual or khas possession of the lands as against the person wrongfully taking the rents and profits to which he, the landlord, is entitled. It is an error to consider that any new system of procedure is required." The same view was recognised and applied in the cases of *Somiammal v. Vellaya Sethurayan* (1), and *Tiru Vengada v. Venkatachala* (2). These cases distinguished the earlier decision in *Ramanadan v. Pulikutti* (3). Reference has also been made to the decisions in *Akhil Chandra Dey v. Akhil Chandra Biswas* (4) and *Jagannatha Charry v. Rama Rayer* (5), which confirmed the proposition that a landlord holds possession through a tenant and can bring a suit under section 9 of the Specific Relief Act to recover possession of property of which he has been dispossessed by act of a third party. We are consequently of opinion that it was open to the plaintiffs, in the events which have happened, to institute this suit to recover possession of the land by declaration of their title—such possession when recovered from the first defendant to be held by the plaintiffs through the seventh defendant—the tenant who had been dispossessed by the trespasser. The decree of the Subordinate Judge consequently signifies that in execution of the decree, at the instance of the plaintiffs, the first defendant is to be evicted from the land and it is to be declared at the same time that upon such eviction the seventh defendant will be entitled to keep the land and continue to hold the land as tenant of the plaintiffs.

The result is that this appeal is allowed, the decree of Mr. Justice Cuming set aside and that of the Subordinate Judge restored with costs here and below.

A. T. M.

L. P. A. allowed.

(1) (1914) 29 M. L. J. 233.

(2) (1911) 1 L. R. 39 Mad. 1042.

(3) (1898) 1 L. R. 21 Mad. 288.

(4) (1911) 15 C. W. N. 715.

(5) (1904) 1 L. R. 28 Mad. 238.

CIVIL RULE.

Before Mr. Justice B. B. Ghose.

BASANTA KUMARI GUPTA AND OTHERS

v.

ABHOY SANKAR SEN AND OTHERS.*

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November, 14.

Appeal—Review, granting of—Erroneous order—Civil Procedure Code (Act V of 1908), Sec. 151, O. 47 Rr. 1, 7.

A suit was dismissed for default. As one of the plaintiffs was personally present at the time of the said order, an application for review was filed, on which the following order was passed by the Munsiff: "I set aside the order of dismissal of the suit and restore the suit in the exercise of inherent jurisdiction of this Court as section 151 of the Code of Civil Procedure gives me based on the application under order 47, rule 1 C. P. C." Against this order, an appeal was preferred by the defendants to the District Judge, who set aside the order of the Munsiff restoring the original suit:

Held, that though there might not have been sufficient reasons for entertaining an application for review, there was no appeal from that order, however erroneous it might be.

Held also, that there was no appeal to the District Judge against an order passed under section 151 of the Code of Civil Procedure.

Application for Revision under section 115 of the Code of Civil Procedure by the Plaintiffs.

The material facts appear from the judgment.

Babu Sures Chandra Talukdar for the Petitioners.

Babu Nagendra Nath Ghose for the Opposite party.

The following judgment was delivered by

B. B. Ghose J: This Rule was obtained by the plaintiffs for revision of an order passed on appeal by the District Judge of Dacca, dated the 23rd September, 1921, from an order of the Munsif of the same place dated the 7th February, 1921, by which he set aside the order of dismissal of a suit and restored it for hearing. What happened was that the suit had been proceeded with for a considerable time and, as the learned Munsif observes, was advanced to some extent and that the plaintiffs had spent a good deal of money for it. The suit related to establishment of the plaintiffs' title to a piece of land and if the plaintiffs' allegations in the plaint

November, 14.

*Civil Rule No. 2 of 1922, against the decision of W. N. Delevigne Esq., District Judge of Dacca, dated the 23rd September, 1921, reversing that of Babu M. N. Lahiri, Munsiff, 5th Court, of Dacca, dated the 7th February, 1921.

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are true, the act of the defendants would affect their rights to a very great extent. On the last occasion when the suit came up for hearing before the Munsif it so happened that the two pleaders engaged for the plaintiffs were both absent. The Munsif dismissed the suit for default. There was an application for restoration of the suit shortly afterwards under order 9 rule 9 Civil Procedure Code. But a difficulty was found in proceeding with the application under that rule as one of the plaintiffs happened to be present in person in Court when the order for dismissal was made. This difficulty felt by the Munsif was overcome by his allowing the plaintiffs to alter their application for restoration of the suit to one for review of his previous order and this, it appears, was not objected to by the defendants. Then the Munsif treating that application as an application for review under order 47, rule 1 Civil Procedure Code set aside his previous order of dismissal of the suit. He states in his judgment, "I set aside the order of dismissal of the suit and restore the suit in the interest of justice and in the exercise of inherent jurisdiction of this Court as section 151 of the Code of Civil Procedure gives me based on the application under order 47, rule 1 Civil Procedure Code." Then he imposed certain terms on the plaintiffs as regards payment of costs.

The defendants appealed to the District Judge and on appeal the learned Judge held that the plaintiffs had failed to show that they had any sufficient cause for applying for review of judgment and thereupon allowed the appeal and set aside the order of the Munsif, restoring the original suit. The question raised by the petitioners is that the appeal to the District Judge was incompetent having regard to order 47, rule 7 of the Code of Civil Procedure. It is contended by the opposite party that there was an appeal to the District Judge, because the order of the Munsif contravened the provisions of rule 4, sub-rule (1) of order 47 and secondly, that the order of the Munsif restoring the suit having been passed without jurisdiction, I should not in any case restore the order of the Munsif. With regard to the last contention, I am of opinion that assuming that the Munsif's order was not in strict accordance with the procedure laid down in the Civil Procedure Code, the result has been to remove a great hardship, and it was, as he himself has put it, "in furtherance of justice." If I were asked to set aside this order in revision I do not think I should have interfered with it in the exercise of my discretion. If, however, as the learned vakil for the opposite party contends, the appeal to the District Judge was competent, this Court cannot revise the order of the District Judge. It

seems to me that there was no appeal from the order of the Munsif to the District Judge under the provisions of the Code of Civil Procedure. The learned Munsif took into consideration the facts under which he made his previous order and although according to the provisions of the Code, there might not have been sufficient reasons for entertaining an application for review of judgment, there was no appeal from that order, however erroneous it might be, as the grounds on which such an appeal may be entertained are restricted by the provisions of rule (7) order 47. I do not think that the order of the Munsif contravenes any of the provisions of order 47, rule 4. Moreover the learned Munsif purported to have exercised the inherent jurisdiction of the Court under section 151 of the Code of Civil Procedure. There could not be any appeal to the District Judge against an order passed under section 151. I therefore, hold that the appeal to the District Judge was incompetent and the order of the District Judge passed on appeal must therefore be set aside as without jurisdiction and that of the Munsif restored.

Under the circumstances however the petitioners must pay the costs of the appeal before the District Judge to the opposite party.

I make no order as to costs in this Court.

A. T. M.

Rule made absolute.

*Before Sir Nalini Ranjan Chatterjee, Knight, Judge, and
Mr. Justice Panton.*

ASUTOSH CHATTERJEE

v.

UPENDRA CHANDRA AICH*.

Revision—Calcutta Rent Act (III B. C. of 1920), Secs. 2 (f), 15, 18—'Fixing of standard rent'

The decision of the Rent Controller fixing the standard rent under section 2 (f) (ii) and not under section 15 of the Calcutta Rent Act, is open to revision.

The Calcutta Rent Act contemplates fixing of the standard rent by the Controller even in cases not coming under section 15; in other words, in cases coming under section 2 (f) of the Act.

*Civil Rule No. 545 of 1922, against the order of Babu S. C. Banerjee, President of the Calcutta Improvement Tribunal, dated the 10th July, 1922.

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The word 'fixing' in section 18 of the Calcutta Rent Act, is not limited to the case of settlement of the rent by the Controller. It is applicable not only to the cases specified in section 15, but also cases coming under the first and second clauses of section 2 (f).

Application for Revision under section 115 of the Code of Civil Procedure by Landlord.

The material facts appear from the judgment.

Babus Amarendra Nath Bose and *Satindra Nath Mookerjee* for the Petitioner.

Babu Abinash Chandra Ghose for the Opposite Party.

C. A. V.

The judgment of the Court was as follows :

August, 17.

This Rule arises out of proceedings under the Calcutta Rent Act, and the question involved is whether the President of the Tribunal is right in holding that an application for revision under section 18 of the Act could not be made in this case because there was no decision of the Controller fixing the standard rent.

The landlord stated that the premises were let out at a rent of Rs. 70 the tenant, on the other hand, stated that it was Rs. 50 only. The tenant applied to the Rent Controller for certifying the standard rent.

The Rent Controller after a consideration of the evidence came to the conclusion that the rent should not be more than Rs. 50 per month inclusive of taxes, and that the rent was fixed at this rate when the applicant came in, and he made the following order : "Rupees fifty inclusive of taxes is therefore the standard rent of this portion (eastern) of the premises occupied by the applicant under section 2 (f) (ii) of the Act."

Both parties applied to the President of the Tribunal under section 18 of the Act, and he was of opinion that an application for revision under section 18 could be made only in cases where the Rent Controller fixes the standard rent under the provisions of section 15 of the Act, that as the Controller's decision in the present case has been given expressly under section 2 (f) (ii) of the Act, he did not fix any standard rent for the premises and that therefore the order was one which could not be revised under section 18 of the Act.

Now section 18 provides for an application for revision to the President of the Tribunal if the decision of the controller fixing the standard rent for any premises is questioned. There is no doubt that there was a decision of the Controller in this case. The only

question is whether there was a decision fixing the standard rent.

The standard rent is defined in section 2 clause (f), and it means (i) the rent at which the premises were let on the 1st day of November 1918, or when they were not let on that date, the rent at which they were last let before that date and after the first day of November 1915, with the addition, in either case, of ten per cent on such rent; (ii) in the case of any premises which were or shall be first let after the first day of November 1918, the rent at which the premises were or may be first let; (iii) in the cases specified in section 15, the rent fixed by the Controller.

The word "fix" has not been defined in the Act. It no doubt means "to settle" and that is the view which has been taken by the learned President. It also means "to specify" or "to determine" (see the Oxford Dictionary). In the absence of any definition of the word in the Act, we do not see any sufficient reason for limiting the word to the case of settlement of the rent by the Controller, unless there is a clear indication in the Act that the word is used in that restricted sense. We do not find any such indication. On the other hand, reference to some of the other sections would indicate that the expression "fixing" is applicable not only to the cases specified in section 15, but also cases coming under the 1st and 2nd clauses of section 2 (f). Thus section 8 provides that "wherever an increase of the rent of any premises is allowable under the provisions of this Act, no such increase shall be recoverable until the expiry of one month after the landlord has served on the tenant a notice in writing of his intention to increase the rent, accompanied by a certificate from the Controller fixing the standard rent." It appears from the terms of this section that no increase of the rent allowable under the Act can be recovered unless notice be served upon the tenant accompanied by a certificate from the Controller fixing the standard rent. This will cover a case of the rent originally payable on the 1st November, 1918, with the addition of the statutory 10 per cent. on such rent.

It is contended, however, by the learned pleader for the opposite party that that section contemplates a case where the rent exceeds the standard rent because the additional 10 per cent. is included in the standard rent under section 2 (f).

There is no doubt that the ten per cent. is included in the standard rent; but the 10 per cent addition is an "increase of the rent" which is allowable under the provisions of this Act, because section 2 (f) is also a provision of the Act, and the section seems to lay

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down that no sum in excess of the rent originally payable can be recovered without a certificate from the Controller fixing the standard rent, where of course there is a dispute between the parties.

The learned pleader for the opposite party pointed out that section 8 of the Burma Rent Act (II of 1890) which has been followed by the Calcutta Rent Act, lays down that the certificate of the Controller fixing the standard rent must be served along with a notice upon the tenant only in cases mentioned in sections 5 and 7, but that the clauses (a) and (b) of section 8 which thus limit the application of the section have been omitted from the Calcutta Rent Act. The natural inference however from that omission would be that instead of confining the operation of section 8 to certain cases i. e., sections 5 and 7, the Calcutta Rent Act provides generally for a notice wherever an increase of the rent of any premises is allowed. The learned pleader also contended that the word "certifying" has been used in the Act as distinguished from "fixing." But the two expressions refer to two different things. The certificate is to be granted after the rent is fixed and it is to be granted to either of the parties. We do not think therefore, that the use of the two expressions leads to the conclusion that the fixing of rent by the Controller can be made only under the provisions of section 15.

It appears therefore that the Act contemplates fixing of the standard rent by the Controller even in cases not coming under section 15; in other words, in cases coming under section 2 (f) (i): and if the word "fix" has been used in that section in a particular sense, we must give the word the same meaning in other portions of the Act where it occurs.

We are accordingly of opinion that the order of the Rent Controller is liable to revision under section 18 of the Act. The order of the President is therefore set aside and the case is sent back to his Court in order that he may hear the applications made to him by both the landlord and the tenant and dispose of them according to law.

The opposite party, however, must pay the costs of the petitioner, the hearing fee in this Court being assessed at 2 gold mohurs. The costs in the lower Courts will abide the result.

A. T. M.

Rule made absolute: Case sent back.

CRIMINAL REVISION.

Before Mr. Justice Walmsley, and Mr. Justice Sukrawardy.

GOSTO BEHARY BASU AND OTHERS

v.

BAISTAM DASS DEURA.*

CRIMINAL.

1922.

April, 11.

Procedure—Changing procedure in the middle of a trial—Regular trial changed into summary trial.

A Magistrate cannot change to the prejudice of an accused a procedure in the middle of a trial.

A Magistrate caused the examination in chief of the prosecution witnesses to be recorded in the form of a narrative under section 359 of the Code of Criminal Procedure, while the cross-examination of those same witnesses and the whole evidence of the defence were taken down summarily under Chap. XXI :

Held, that the Magistrate's procedure was not authorised by law and caused prejudice to the accused under the circumstances of the case.

Application for Revision under section 435 of the Code of Criminal Procedure by the Accused.

The material facts appear from the judgment.

The Sub-Deputy Magistrate convicted the petitioners under section 186 I. P. C. and sentenced petitioner No 1 to pay a fine of Rs. 150, petitioner No. 2 to a fine of Rs. 30 and petitioner No. 3 to a fine of Rs. 75 or in default each to suffer rigorous imprisonment for 3 weeks. An application for a reference of which order to the High Court for revision was rejected by the Sessions Judge. Hence this application.

Babus Nagendra Nath Ghose and Dwigendra Krishna Dutt for the Petitioners.

Babu Narendra Nath Chowdhury for the Opposite Party.

The judgment of the Court was delivered by

Walmsley, J : The petitioners have been convicted under section 186 I. P. C. and sentenced to pay fines of Rs. 150, 30 and 75 respectively. The Magistrate purported to dispose of the case under summary procedure. So under section 414 Cr. P. C. the petitioners had no right of appeal. They moved the Sessions Judge for a reference to this Court, but without success.

April, 11

*Criminal Revision No. 226 of 1922, against the order of the Sessions Judge of Hooghly, dated the 23rd January, 1922, rejecting the application for reference to High Court against the order of the Sub-Deputy Magistrate of Ulubaria, dated the 2nd December, 1921.

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Walmisley, J.

The circumstances under which we issued a Rule are as follows :

The petitioners were summoned under section 186 and section 206 I. P. C. Offences under the latter section cannot be tried summarily, and the learned Magistrate began to try the case under Chapter XXI, recording the evidence in the manner prescribed in Chapter XXV. Seven witnesses for the prosecution were thus examined in chief on September 17th : the accused were also examined on that day. Then the Magistrate recorded this order : "As no offence under section 206 I. P. C. has been made out, the case will go on under sections 186, 143 I. P. C. and will be tried under section 260 Cr. P. C." Afterwards, on the 29th of September, the prosecution witnesses were recalled for cross-examination. Then defence witnesses were examined and the Magistrate then made use of one of the forms authorised for use in summary trials, and recorded a judgment which began on the first page of that summary form.

So far as the examination of the witnesses is concerned, it may be that the record is as full as it would have been if there had been no change of procedure. The cross-examination of the prosecution witnesses covers a fair amount of paper, and save for the facts that the usual details of parentage, residence and occupation are not given the same is true of the evidence given by the defence witnesses.

The argument pressed before us and the ground on which we issued the Rule is that the learned Magistrate could not after examining the prosecution witnesses in chief in the regular manner, change his procedure to that allowed by chapter XXII.

The learned Magistrate in his explanation has drawn our attention to several reported decisions but none of them touch the point now raised. We are not concerned with the question whether a Magistrate may strip a story of its embellishments, but with the question whether he may change his procedure in the middle of a trial.

The Code itself provides by the second clause of section 260 (2) for the converse of what has happened here, and requires in effect a *de novo* trial. I doubt however whether any useful inference can be drawn from the absence of any provision as to what should be done when in the course of a regular trial, it appears desirable that the case should be tried summarily.

It appears to me that the question resolves itself into the question whether the petitioners have been prejudiced or not. The learned Magistrate says that they have not been prejudiced I cannot agree. On the contrary, I think the petitioners have suffered

prejudice in two ways. The first is in the recording of evidence. Possibly in fact the record is as full as it would have been had the Magistrate continued to try the case in the regular manner, but we have to look at what the law required of the trying Magistrate and an accused person may reasonably complain of a procedure which has caused the examination-in-chief of the prosecution witnesses to be recorded in the form of a narrative under section 359 Cr. P. C. while the cross-examination of those same witnesses and the whole evidence of the defence witnesses need not appear on the record at all. The second and graver prejudice is that two of the petitioners have lost the right of appeal. That is a loss which needs no comment. I only wish to point out that the gravity of the prejudice seems enhanced rather than lessened by the fullness of the record actually prepared by the Magistrate. *Prima facie* there is material on which an appellate Court could exercise its judgment, but a few words in the order sheet and the use of a form with a particular heading have deprived two of the petitioners of the right they would otherwise have had.

In my opinion the Rule must be made absolute on the ground that the Magistrate's procedure is not authorised by law and has caused prejudice to the petitioners.

The result is that the convictions and sentences are set aside; and it is ordered that the fines if paid be refunded.

We are asked to say that the case should not be re-tried by the same Magistrate as he has shown cause before us and also before the Sessions Judge, and consequently he may find it difficult to approach the case with an open mind. As the learned pleader on behalf of the petitioners undertakes that his clients will not ask for the prosecution witnesses to be again examined in chief, I think this concession may be allowed. The case will go back to be tried by some competent Magistrate, other than Mr. R. L. Acharjee, to be nominated by the District Magistrate; and such Magistrate will proceed with the case from the point which it reached on September 17th, and dispose of it in accordance with law.

A. T. M.

Rule made absolute.

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Walmsey, J.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Rankin.

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August, 24
November, 14.

MAHAMMAD MAZAHARAL AHAD

v.

MAHAMMAD AZIMUDDIN BHUIAN.*

Limitation—Limitation Act (IX of 1908), Sch. I. Arts. 103, 104, 116—Suit for recovery of dower debt—Money claim—Compensation and damages—Legislature—Presumption—Construction put upon an Act.

Article 116, schedule I of the Limitation Act applies to suits for recovery of dower debt when there is a registered dower deed, although articles 103 and 104 would apply when there is no such registered instrument : *Tricumdas v. Gopinath* (1) applied.

The expression compensation is not ordinarily used as an equivalent to damages, although compensation may often have to be measured by the same rule as damages in an action for the breach : *Dixon v. Calcraft* (2).

The legislature is presumed to know not only the general principles of law, but also the construction which the Courts have put upon particular statutes ; where a section of an Act which has received a judicial construction is re-enacted in the same words, such re-enactment is treated as a legislative recognition of that construction : *Jogendra v. Shyam Das* (3) and other cases.

Appeal by the Defendant.

Suit for recovery of the plaintiff's share of the dower debt.

The material facts appear from the judgment.

Babus Biraj Mohan, Mojumdar and Chandra Sekhar Sen for the Appellant.

Babu Rajendra Chandra Guha for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—The facts material for the determination of the question of limitation raised in this appeal are no longer in dispute and may be briefly recited. The plaintiff respondent, a Mahomedan gentleman, gave his daughter in marriage to the defendant appellant. At the time of the marriage, the defendant executed

* Appeal from Appellate Decree No. 87 of 1921, against the decree of Bannan Sen Esq, Additional District Judge of Dacca, dated the 5th October, 1920, affirming that of Babu Narendra Nath Ghosh, Subordinate Judge of Dacca, dated the 30th March, 1917.

(1) (1916) L. R. 44 I. A. 65 ; I. L. R. 44 Calc. 759 ; 25 C. L. J. 279.

(2) (1892) 1 Q. B. 458 (463).

(3) (1909) I. L. R. 36 Calc. 543 ; 9 C. L. J. 271.

and registered in favour of his wife a dower deed, on the 15th September, 1908. The deed fixed the dower at Rs. 5000 ; one half was prompt and payable on demand ; the other half was deferred. The lady died on the 18th September 1909. On the 10th September 1915, the plaintiff, as one of the heirs at law of his daughter, instituted the present suit against the son-in-law for recovery of his one-third share of the dower debt. The defendant pleaded, amongst other defences, the bar of limitation. The Court of first instance held that the suit was governed not by the three years, but by the six years, rule of limitation and decreed the claim. On appeal, this decision has been affirmed by the District Judge. On the present appeal, that decree has been assailed on the ground that the suit is barred by the three years rule of limitation. The respondent has urged that the six years rule is applicable, as the dower was fixed by a registered document.

Art. 103 of the schedule to the Indian Limitation Act, 1908, provides as follows :—

“ 103. A suit by a Mahomedan for exigible dower shall be instituted within three years from the date when the dower is demanded and refused, or (where during the continuance of the marriage, no such demand has been made) when the marriage is dissolved by death or divorce.”

Art. 104 provides as follows :

“ 104. A suit by a Mahomedan for deferred dower shall be instituted within three years from the date when the marriage is dissolved by death or divorce.”

In the case before us, as there was no demand and refusal during the continuance of the marriage, time ran, both as regards the prompt and the deferred dower, from the date when the marriage was dissolved by death. Consequently, the suit should have been, *prima facie*, instituted within three years from the 18th September, 1909 when the lady died. But the plaintiff has urged—and his contention had been accepted by the Courts below—that as the dower deed was registered, he is entitled to the benefit of Art. 116.

Art. 116 provides as follows :

“ 116. A suit for compensation for the breach of a contract, in writing registered, shall be instituted within six years from the date when the period of limitation would begin to run against a suit brought on a similar contract not registered.”

This plainly refers to Art. 115 which provides as follows :

“ 115. A suit for compensation for the breach of any contract,

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express or implied, not in writing registered and not herein especially provided for, shall be instituted within three years from the date when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases."

The appellant has contended that even if we assume that the present suit for recovery of the dower debt may be treated as a suit for compensation for the breach of a contract in writing registered within the meaning of Art. 116, that article, which provides a general rule applicable to contracts in writing registered cannot be applied when there are special articles, namely, articles 103 and 104, which precisely cover the case. The appellant has, in fact, invoked the well-established principle that if there are two articles in the schedule to the Limitation Act, which may possibly govern a case, the one more general and the other more special, the more particular and specific article should be regarded as the one governing the case. Illustrations of the application of this doctrine may be found in the cases of *Ishur Chunder v. Jibun* (1); *Sharooop Duss v. Joggesur* (2); *Natesan v. Soundararaja* (3); *Runchordas v. Parvatibai* (4); *Narmadabai v. Bhavani* (5). The principle, *generalia specialibus non derogant, specialia derogant generalibus*, has been recognised elsewhere, and illustrations of the doctrine that general provisions do not derogate from special provisions, but that the latter do derogate from the former, are by no means rare; see *Hunter v. Knockolds* (6); *Churchill v. Crease* (7); *De Winton v. Greson Corporation* (8); *Pretty v. Solly* (9). The respondent has not denied that this argument carries considerable weight; but he has urged that it is too late for this Court to depart from what has been recognised in a long line of cases as the true scope of Art. 116, including the decision of the Judicial Committee in *Tricumdas v. Gopinath* (10). As will presently appear, from an examination of numerous judicial decisions, Art. 116 has been held applicable, by reason of the existence of a written and registered contract, in classes of cases which are *prima facie* governed by special provision contained in the schedule to the Indian Limitation Act.

(1) (1888) I. L. R. 16 Calc. 25.

(2) (1899) I. L. R. 26 Calc. 564 F. B. (3) (1897) I. L. R. 21 Mad. 141.

(4) (1899) I. L. R. 23 Bom. 725; I. L. R. 26 I. A. 71.

(5) (1902) I. L. R. 26 Bom. 430.

(6) (1850) 1 Mac. & G. 640; 84 R. R. 217.

(7) (1828) 5 Bing. 180.

(8) (1859) 26 Beav. 533; (543).

(9) (1859) 26 Beav. 606 (610).

(10) (1916) L. R. 44 I. A. 65; I. L. R. 44 Calc. 759; 25 C. L. J. 279.

Art. 57 provides as follows :

"57. A suit for money payable for money lent shall be instituted within three years from the date when the loan is made." It has been repeatedly held that a suit on a registered bond for recovery of a specific sum of money is governed not by Art. 57 but by Art. 116; see *Nobocomar v. Siru Mullick* (1); *Kalut Ram v. Lalā Dhanukdhari* (2); *Sham Charan v. Debya Singh* (3); *Kerr v. Ruxton* (4); *Nistarini v. Chandi* (5); *Ram Narain v. Odindra Nath* (6); *Challaphroo v. Banga Behari* (7); *Husain Ali v. Hafiz Ali* (8); *Khunni v. Nasiruddin* (9); *Sushil v. Gauri* (10); *Ganesk Krishn v. Madhavrao* (11); *Magaluri v. Narayana* (12); *Viswanath v. S. I. Bank* (13).

Art. 64 provides as follows :

"64. A suit for money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them shall be instituted within three years from the date when the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives."

Art. 106 provides as follows :

"106. A suit for an account and a share of the profits of a dissolved partnership, shall be instituted within the three years from the date of the dissolution."

With reference to these articles, it was ruled in *Ranga Reddi v. Chinna Reddi* (14), that where a registered partnership contract binds the parties to pay the loss according to their respective shares, a suit to recover the defendants' share of the loss, on a settlement of accounts between the plaintiffs and the defendants, is governed, neither by Art. 64, nor by Art. 106, but by Art. 116. It is to be noted, however, that in *Vairavan v. Ponnayya* (15), the Court expressed its unwillingness to hold that Art. 116 could be stretched

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(1) (1880) I. L. R. 6. Calc. 94; 6 C. L. R. 579.

(2) (1882) 11 C. L. R. 361.

(4) (1906) 4 C. L. J. 510.

(6) (1911) 15 C. L. J. 17.

(8) (1881) I. L. R. 3 All. 600 F. B.

(10) (1916) 14 A. L. J. 873.

(12) (1881) I. L. R. 3 Mad. 359.

(13) (1917) Mad. W. N. 879; 6 Mad. L. W. 712.

(14) (1890) I. L. R. 14 Mad. 465.

(3) (1894) I. L. R. 21 Calc. 872.

(5) (1910) 12 C. L. J. 423.

(7) (1915) 22 C. L. J. 311.

(9) (1881) I. L. R. 4 All. 255.

(11) (1881) I. L. R. 6 Bom. 75.

(15) (1898) I. L. R. 22 Mad. 14.

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to cover every case in which the suit might in its origin be referred to a contractual relationship expressed in a registered agreement.

Art. 74 provides as follows :

"74. A suit on a promissory note or bond payable by instalments shall be instituted within three years from the date of the expiration of the first term of payment as to the part then payable ; and for the other parts, the expiration of the respective terms of payment." With reference to this provision, it has been ruled that if the instalment bond has been registered, the suit is governed, not by Art. 74 but by Art. 116 : *Din Doyal v. Gopal Sarun* (1) ; *Rup Narain v. Gopi Nath* (2).

Article 89 provides as follows :

"89. A suit by a principal against his agent for moveable property received by the latter and not accounted for, shall be instituted within three years from the date when the account is, during the continuance of the agency, demanded and refused, or, (where no such demand is made) when the agency terminates." With reference to this article, it was ruled in *Mati Lal Eose v. Amin Chand* (3), that a suit for an account by a principal against his agent on the basis of a registered agreement, is governed, not by article 89 but by article 116, the cause of action arising from the date when the contract to render accounts is broken. This view is identical with that taken in *Harender Kishore v. Administrator-General* (4), and was followed in *Easin v. Barada Kishore* (5) ; *Jogesh Chandra v. Benode Lal* (6), and *Bhagirath v. Prem Chand* (7). The current of judicial opinion, however, upon this question has been by no means uniform ; see *Debendra Nath v. Esha Huq* (8) ; *Shib Chandra v. Chandra Narain* (9) ; *Madhusudan v. Rakhal Chandru* (10) ; *Nabin v. Chandra Madhab* (11), modifying *Chandra Madhab v. Nobin* (12) ; *Bhabatarini v. Sheikh Bahadur* (13) ; *Jogendra Nath v. Deb Nath* (14) ; *Hafezuddin v. Jadu Nath* (15) ; *Madhub Chunder v. Debendra Nath* (16) ; *Jhapajannessa v. Rash Behari* (17), and *Pran-*

(1) (1891) I. L. R. 18 Calc. 506.

(2) (1906) 11 C. W. N. 903.

(3) (1902) 1 C. L. J. 211.

(4) (1885) I. L. R. 12. Calc. 357.

(5) (1909) 11 C. L. J. 43.

(6) (1909) 14 C. W. N. 122.

(7) (1912) 17 C. L. J. 201.

(8) (1908) 14 C. W. N. 121.

(9) (1905) I. L. R. 32 Calc. 719 ; 1 C. L. J. 232.

(10) (1915) I. L. R. 43 Calc. 248 ; 22 C. L. J. 552.

(11) (1916) I. L. R. 44 Calc. 1 P. C. ; 24 C. L. J. 509.

(12) (1912) I. L. R. 40 Calc. 108.

(13) (1919) 30 C. L. J. 90.

(14) (1903) 8 C. W. N. 113.

(15) (1908) I. L. R. 35 Calc. 298 ; 7 C. L. J. 279.

(16) (1901) 1 C. L. J. 147.

(17) (1912) 16 C. L. J. 288.

ram v. Jagadish Nath (1). These cases, however, struggle, in most instances, to escape the application of article 116, not so much because the article should not be applied to cases comprised within the scope of special articles, but rather because a suit by a principal against an agent for the relief mentioned in article 89 cannot properly be regarded as a suit for compensation for the breach of a contract in writing registered. This, however, does not apply to the decision in *Pranram v. Jagadish Nath* (1), where the twofold contention was accepted that (a) article 89 excludes the operation of article 115, which is applicable only to cases not specially provided for; and (b) article 116 must be read along with article 115 and be deemed restricted in operation in the same manner. This view, as will presently appear, is opposed to that indicated in *Vythilinga v. Thetchana*, (2); *Din Doyal v. Gopal Sarun* (3), and adopted by the Judicial Committee in *Tricumdas v. Gopinath*, (4). It will be observed that the expression "not herein specially provided for" which finds a place in the first column of article 115 does not reappear in the first column of article 116. But this plainly does not conclude the matter, and the expression "similar contract not registered" which finds a place in the third column of article 116 does require interpretation. Does it refer only to the first column of article 116 and consequently mean "a contract in writing not registered"; or, does it refer to the first column of article 115 and signify "a contract not in writing registered and not herein specially provided for." The first alternative was adopted in *Vythilinga v. Thetchana* (2), and *Din Doyal v. Gopal Sarun* (3) and apparently found favour with the Judicial Committee in *Tricumdas v. Gopinath* (4). The second alternative was adopted in *Pranram v. Jagadish Nath* (1). The conflict, consequently, is between two opposing views; one maintains that article 116, like article 115, applies where there is no special provision; the other maintains that article 116 supersedes all provisions, including those covered by special articles unaffected by article 115. In this connection, reference may also be made to the decision in *Kandaswamy v. Avayambal* (5), where it was ruled that a suit by an agent to recover money spent by him on account of his principal, is governed by article 61 and not by article 116, even though there was a registered con-

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(1) (1921) I. L. R. 49 Calc. 250; 35 C. L. J. 111; 26 C. W. N. 61.

(2) (1880) I. L. R. 3 Mad. 76.

(3) (1891) I. L. R. 18 Calc. 506.

(4) (1916) L. R. 44 I. A. 65.

(5) (1910) I. L. R. 34 Mad. 167.

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tract of agency ; the obligation was deemed as no part of the contract in writing registered, and the earlier decisions in *Krishnan v. Kannan* (1) and *Seshachala v. Varada* (2), were distinguished, though they were clearly authorities for the proposition that obligations not expressed in writing, but imported by the law in the case of sales, might be treated as in writing, for purposes of limitation, when the sale was made by a written instrument.

Article 110 provides as follows :

"110. A suit for arrears of rent shall be instituted within three years from the date when the arrears become due." It has been ruled in a long series of decisions that a suit for arrears of rent, based upon a registered lease, is governed, not by article 110 but by article 116 : *Vythilinga v. Thetchanamurti* (3) ; *Umesh Chunder v. Adarmoni* (4) ; *Iswari Pershad v. Crowdy* (5) ; *Raniganj Coal Association v. Judoonath* (6) ; *Umrao Bibi v. Mahomed Rojabi* (7) ; *Ambalavana v. Vaguran* (8) ; *Chengiah v. Umarai* (9) ; *Sundaramier v. Muthu* (10) ; *Kannan v. Muthalpuremath* (11) ; *Mohamad Hanif v. Moorat Mahton* (12) ; *Mackenzie v. Rameswar* (13) ; *Lalchand v. Narayan* (14). The contrary view, adopted in *Ramasami v. Sokkanada* (15), and *Ram Narain v. Kamta Singh* (16), has now been expressly disapproved of by the Judicial Committee in *Tricumdas v. Gopinath* (17). Suits for rent under the Bengal Tenancy Act have, however, escaped this fate ; they have been held to be governed by the special rule contained in the schedule to that statute, which remains unaffected by article 110 and article 116 ; see the decision of the Full Bench in *Mackenzie v. Haji Syed Mahomed* (18).

We have not given above an exhaustive enumeration of all the judicial decisions relevant to the points mentioned ; but we have stated enough to show that article 116 has been repeatedly interpreted, in the most diverse connections, as if it were a generalised exception engrafted upon all articles which might, by stretch of language, be

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| (1) (1897) I. L. R. 21 Mad. 8. | (2) (1901) I. L. R. 25 Mad. 55. |
| (3) (1880) I. L. R. 3 Mad. 76. | (4) (1887) I. L. R. 15 Calc. 221. |
| (5) (1890) I. L. R. 17 Calc. 469. | (6) (1892) I. L. R. 19 Calc. 483. |
| (7) (1899) I. L. R. 27 Calc. 205. | (8) (1895) I. L. R. 19 Mad. 52. |
| (9) (1910) 7 Mad. L. T. 419. | (10) (1912) 11 Mad. L. T. 276. |
| (11) (1919) 11 L. W. 328. | (12) (1918) 4 Pat. L. W. 146. |
| (13) (1916) 1 Pat. L. J. 37 ; 2 Pat. L. W. 416. | |
| (14) (1913) I. L. R. 37 Bom. 656. | |
| (15) (1887) 1 Mad. L. J. 737 ; 2 Mad. L. J. 69 (notes) | |
| (16) (1903) I. L. R. 26 All. 138. | (17) (1916) L. R. 44 I. A. 65. |
| (18) (1891) I. L. R. 19 Calc. 1 (F. B.). | |

regarded as applicable to suits comprehended within the description of a suit for compensation for the breach of a contract." One of the earliest of these decisions : *Nobocommar v. Siru Mullick* (1), goes back to 1880, and the judgment in that case as also judgments delivered by the Full Bench in 1881 in *Husain Ali v. Hafiz Ali* (2), were based upon historical review of the previous legislation on the subject ; but it may be observed parenthetically that some of the judgments delivered by the Full Bench also referred to inadmissible materials, such as, what happened in the Legislative Council ; *Administrator-General v. Premlal Mallik* (3). Yet the construction then placed upon article 116 of the Limitation Act, 1877, must be taken to have found favour with the legislature, as it has been reproduced without alteration in the Limitation Act, 1908. The legislature is presumed to know not only the general principles of law, but also the construction which the Courts have put upon particular statutes ; where a section of an Act which has received a judicial construction is re-enacted in the same words, such re-enactment is treated as a legislative recognition of that construction : *Jogendra Chandra v. Shyam Das* (4) ; *Kamini Debi v. Pramatha Nath* (5) ; *Nagendra Mohon v. Pyari Mohan* (6). The Judicial Committee in *Tricumdas v. Gopinath* (7), felt impressed by this consideration, and Lord Sumner emphasised the fact that when the Limitation Act of 1877 was replaced by the Limitation Act of 1908, the language and arrangement of the relevant articles were left unaltered. In such circumstances, no useful purpose will be served by an attempt to examine the foundations of the long series of decisions which the Judicial Committee found themselves bound to recognise.

In answer to the contention that claims of this character sound in debt and not in damages, it may be pointed out, however, that the term used in article 115 and article 116 is not damages but compensation, which also occurs in section 73 of the Indian Contract Act. As Lord Esher observed in *Dixon v. Calcraft* (8), the expression compensation is not ordinarily used as an equivalent to damages, although, as remarked by Fry, L.J. in *Skinnors' Co. v. Knight* (9), compensation may often have to be measured by the

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(1) (1880) I. L. R. 6 Calc. 94.

(2) (1881) I. L. R. 3 All. 600.

(3) (1895) L. R. 22 I. A. 107 ; I. L. R. 22 Calc. 788.

(4) (1909) I. L. R. 36 Calc. 543 ; 9 C. L. J. 271.

(5) (1911) I. L. R. 39 Calc. 33 ; 15 C. L. J. 597.

(6) (1915) I. L. R. 43 Calc. 103 ; 21 C. L. J. 605.

(7) (1916) L. R. 44 I. A. 65.

(8) (1892) 1 Q. B. 458 (463). (9) (1891) 2 Q. B. 542.

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same rule as damages in an action for the breach. The term compensation, as pointed out in the Oxford Dictionary, signifies that which is given in recompense, an equivalent rendered. Damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained; the value estimated in money, of something lost or withheld. The term compensation etymologically suggests the image of balancing one thing against another; its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent. The derivative meaning was familiar to the Roman jurists and re-appears in the modern codes founded on the Civil Law. (Sohm, Institutes of Roman Law, 3rd Edition pp. 458-463).

The term compensation, as used in Arts. 115 and 116 is thus, perhaps, not sufficiently precise, while the technical distinction between debt and damages may be too refined for the purpose.

We must hold that the decision of the Judicial Committee in *Tricumdas v. Gopinath* (1), though concerned directly with the applicability of article 110 and article 116 to a suit for arrears of rent, instituted upon a registered lease, must be regarded as of far-reaching application. We cannot ignore the principle which lies at the root of that decision and must govern the applicability of article 116 to cases other than those covered by article 110, wherever the position may reasonably be maintained that the claim sought to be enforced is a claim for compensation for breach of a contract in writing registered. We must consequently examine whether a claim for exigible dower and a claim for deferred dower fall within this category.

The nature of dower debt was examined by this Court in the case of *Mir Mahar v. Amani* (2), and it was ruled that, according to Muhammedan Law, when the heirs of a Muhammedan woman claim from her husband dower which was not due or payable until her death, their claim is a simple money claim, founded solely on the contract entered into by the husband. The Limitation Act then in force was Act XIV of 1859. Clause 9 of section I provided a period of three years for the institution of a suit brought to recover money lent or interest or for the breach of any contract. Clause 10 of section I provided a period of three years for a suit brought to recover money lent or interest or for the breach of any

(1) (1916) L. R. 44 I. A. 65.

(2) (1869) 2 B. L. R. 306; 11 W. R. 212.

contract in a case in which there was a written engagement or contract and in which such engagement or contract could have been, but had not been registered within six months from the date thereof. Clause 16 of section I provided a period of six years for all suits for which no other limitation was expressly provided. The Court held that the suit for dower was a simple suit for the breach of a contract, within the meaning of clauses 9 and 10 of section I. Reference was made to the decisions in *Mahomed Faes v. Oomdah Begum*, (1) and *Woomatool Fatima v. Meerunmunnessa* (2); the first had been cited as an authority for the position that a suit for dower was not founded on the contract, but on the withholding of the widows's estate from the heirs. The second had been relied upon to support the contention that the claim to recover the dower debt was in essence to enforce a lien upon the estate of the deceased as against those entitled as heirs. These dicta were explained away, and it was held that the dower, like any other debt, must be paid before the estate divisible among the heirs can be ascertained, and that the suit to recover the dower debt is nothing more nor less than a suit to enforce a simple money claim founded solely on the contract entered into by the husband; see also *Wafeah v. Saheeba* (3), *Janee Khanum v. Amatool Fatima* (4); *Mahabu Bibi v. Amina* (5). The view taken in these cases is supported by the observation of Sir Montague Smith in *Khajooroonissa v. Ryeesoonissa* (6), namely, that prompt or exigible dower may be considered a debt always due and demandable, and certainly payable upon demand, with the result that upon a clear and unambiguous demand and refusal, a cause of action would accrue and the statute would begin to run. To the same effect is the remark of Lord Parker in *Hamira v. Zubaida*, (7), that the dower ranks as a debt, and the right of the wife is no greater than that of any other unsecured creditor of her husband, subject to the reservation that if she lawfully, with the express or implied consent of the husband or his other heirs, obtains possession of the whole or part of his estate to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession, unless it is satisfied; see also *Nurunnessa v. Kazi Mahomed* (8). and

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Mookerjee, J.

(1) (1866) 6 W. R. 111.

(2) 1868) 9 W. R. 318.

(3) (1867) 8 W. R. 307.

(4) (1867) 8 W. R. 51.

(5) (1873) 10 Bom. H. C. R. 430 A. C.

(6) (1875) L. R. 2 I. A. 235; 15 B. L. R. 306; 24 W. R. 163.

(7) (1916) L. R. 43 I. A. 294; I. L. R. 38 All. 581; 25 C. L. J. 517.

(8) (1919) I. L. R. 47 Calc. 517; 31 C. L. J. 14.

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Abi Dhunimsa v. Mahammad Fathiuddin (1). In view of the principles expounded and applied in the long series of decisions which have now met with the approval of the Judicial Committee in *Tricumdas v. Gopinath* (2), there is thus no escape from the conclusion that article 116 applies to suits for recovery of dower debt when there is a registered dower deed, although articles 103 and 104 would apply when there is no such registered instrument. We are not unmindful that the contrary view was, without argument, assumed to be correct in *Ful Chand v. Nazab Ali* (3). The view which we are constrained to adopt coincides with that taken in the case of *Asiatulla v. Danish Muhammed* (4), which was brought to our notice after the arguments had been closed, and has been reported since then.

The result is that the decree made by the District Judge is affirmed and this appeal is dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1917) I. L. R. 41 Mad. 1026.

(2) (1916) L. R. 44 I. A. 65.

(3) (1908) I. L. R. 36 Cal. 184; 9 C. L. J. 105.

(4) (1922) 36 C. L. J. 379.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Chotsner.*

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June, 16.

MOYDHANNESSA BIBI AND ANOTHER

v.

SATIS CHANDRA GIRI AND ANOTHER.*

Compromise—Rent—Bengal Tenancy Act (VIII of 1885), Sec. 109 C.—Fair and equitable rent—Contract contravening provisions of the Act.

In every case, where the provisions of section 109 C of the Bengal Tenancy Act are invoked, there should be a strict compliance with its requirements.

Under section 109 C of the Bengal Tenancy Act, the Settlement Officer has to determine, in the first place, whether the terms of the agreement are really such that if they were embodied in a contract, they would not be enforced under the Act. If the conclusion is in the affirmative, he is to satisfy himself that the rent agreed upon is fair and equitable. It is only in the event of his being so satisfied, but not otherwise, that he can settle such rent as fair and equitable rent.

*Appeal from Appellate Decree No. 1853 of 1920, against the decree of Babu Sarat Chandra Bose, Subordinate Judge of Hughly; dated the 8th April, 1920, reversing that of Moulvi Hasibuddin Ahmed, Munsif of Serampore, dated the 29th May, 1915.

Where the order of the Revenue officer was: "The tenant agrees. Though the increase is rather large, the attested compromised rent may be settled as fair and equitable":

Held, that section 109 C of the Bengal Tenancy Act did not contemplate settlement of fair and equitable rent on the basis of such an ambiguous order, and in accordance with a contract, which contravened the provisions of the Bengal Tenancy Act.

Appeal by the Plaintiffs.

Suit for declaration.

The material facts appear from the judgment.

Babus Sib Chandra Palit and *Mani Lal Bhattacharjee* for the Appellants.

Babu Asita Ranjan Ghose for the respondents.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the plaintiffs in a suit for a declaration that a solenama entered into between the second plaintiff and the defendant, and the decree for rent based thereon, were fraudulent and illegal. The defendant claimed rent at the rate of Rs. 40-as 13 which was entered in a petition of compromise and which was filed before the Revenue Officer on the 1st March 1910. The plaintiffs contended that the rent was payable at the rate of Rs. 28 which is entered as the fair and equitable rent in the finally published record of rights. The Court of first instance decided in favour of the plaintiffs. The lower appellate Court reversed that decision. On second appeal to this Court the case was remanded for further consideration. After remand, the Subordinate Judge has adhered to his previous decision. We have consequently to consider, whether the rent is payable at the rate of Rs. 40-as 13, as claimed by the defendant, or at the rate of Rs. 28, as claimed by the plaintiff.

The case for the defendant is that this compromise cannot be impeached, as it was considered by a Revenue Officer especially empowered under sec 109 C Bengal Tenancy Act, who was satisfied that the rent agreed upon was fair and equitable: If the defendant is able to establish this allegation, he is entitled to succeed. But this raises a question of the true scope and import of sections 109 B and 109 C. of the Bengal Tenancy Act.

It is well-known that before these sections were enacted, it had been ruled in *Sheo Sahoy v. Ram Rachia Roy* (1) and *Nath Singh v. Dumri Singh* (2); which were applied in *Kedar Nath Hazra v.*

(1) (1891) I. L. R. 18 Calc. 333;

(2) (1900) I. L. R. 28 Calc. 90.

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Mukharaja Mamindra Chandra Nandi (1) and *Bota Mondal v. Manindra Chandra Nandi* (2), that an agreement for variation of rent might be held valid, even though it was in contravention of the provisions of section 29 Bengal Tenancy Act, if it was established that such agreement was for the purpose of settlement of some *bona fide* dispute. This allowed the landlord to evade the provisions of section 29 Bengal Tenancy Act. The result was that sections 109 B and 109 C were introduced into the Bengal Tenancy Act.

Section 109 B empowers the Revenue Officer to test the agreement or compromise made or entered into by every landlord and his tenant, and he is enjoined not to give effect to any agreement or compromise, the terms of which, if they were embodied in a contract, could not be enforced under the Act. He is further empowered to hold an enquiry, whether the effect of the new agreement or compromise would be to enhance the rent in a manner or to an extent not allowed by section 29 in the case of a contract. As a set off against this provision, section 109 C was introduced, and a Revenue Officer, especially empowered in this behalf, was authorised to settle rents on agreement, if he was satisfied that the rent agreed upon was fair and equitable, even if such rent might be in contravention of section 29 Bengal Tenancy Act.

It is consequently necessary, that in every case, where the provisions of section 109 C are invoked, there should be a strict compliance with its requirements. That section provides as follows: "Notwithstanding anything contained in section 109 B, if in any case, while the record is being prepared, the landlord and tenant agree to the rent which shall be recorded as payable for the tenure or holding, a Revenue Officer, especially empowered in this behalf by the Local Government, may, if he is satisfied that the rent agreed upon is fair and equitable, but not otherwise, settle such rent as a fair and equitable rent, although the terms of the agreement are such that if they were embodied in a contract, they could not be enforced under this Act." Consequently, the Settlement Officer has to determine, in the first place, whether the terms of the agreement are really such that if they were embodied in a contract, they would not be enforced under this Act. If the conclusion is in the affirmative, he is to satisfy himself that the rent agreed upon is fair and equitable. It is only in the event of his being so satisfied, but not otherwise, that he can settle such rent as fair and equitable rent.

(1) (1909) 11 C. L. J. 106.

(2) (1914) 21 C. L. J. 325.

In the case before us the Revenue Officer did not comply with the requirements of section 109 C. His order is in these terms: "The tenant agrees. Though the increase is rather large, the attested compromised rent may be settled as fair and equitable." Section 109 C does not contemplate settlement of fair and equitable rent, on the basis of such an ambiguous order and in accordance with a contract, which contravenes the provisions of the Bengal Tenancy Act. There is the further significant fact that effect was not given to this order, and when the record was finally published, an entry was made therein that fair and equitable rent was Rs. 28 and not Rs. 40-13. The defendant has put forward the theory that this was due to inadvertence on the part of some officer in the revenue department. There is no foundation for this contention, for although the case was remanded and an opportunity was given to the defendant to adduce evidence, he has not availed himself of this opportunity. On the record as it stands, it is impossible for us to hold that the agreement which was in contravention of section 29 Bengal Tenancy Act was accepted by the Revenue Officer under section 109C because he was satisfied that the rent agreed upon was fair and equitable. In these circumstances, we must hold that the defendant is not entitled to claim rent on the basis of the compromise.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit decreed on the basis that rent is payable at the rate of Rs. 28. The plaintiffs appellants are entitled to their costs in all the Courts.

A. T. M.

Appeal allowed.

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Hookerjee, J.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Rankin.*

CIVIL.

1922.

August 16.
November, 14.

KAMINI KUMAR DEB.

v.

DURGA CHARAN NAG AND OTHERS.*

*Appeal—Civil Procedure Code (Act V of 1908), O. 41 R. 26—Appellate Court,
decision of—Second appeal—Remand—Inherent power—Deed, fictitious—
Third party, if can challenge—Title and possession, question of.*

When an order has been made under order 41 rule 25 of the Code of Civil Procedure, the appeal remains pending and undisposed of on the file of the Court and the ultimate decision when the Court is called upon to determine the appeal finally under order 41 rule 26, is to be based upon a consideration of all the findings before and after the order under order 41 rule 25. Neither the order nor the materials placed on the record on the basis thereof can be rejected as if brought in without lawful authority.

In second appeal, the appropriate course to follow is to make, not an order under order 41 rule 25, but an order of remand in the exercise of inherent power of the Court: *Ghasnavi v. Allahabad Bank* (1) and *Brij Indar v. Kanshi Ram* (2).

A stranger to a deed can challenge it as fictitious, never designed to operate as a real deed or to effect a transfer of the title.

Questions of title and possession cannot always be properly considered piecemeal as disconnected fragments.

Appeal by Defendant No. 1.

Suit for recovery of possession of land upon declaration of title.

The material facts appear from the judgment.

Babu Birendra Kumar Dey for the Appellant.

*Babus Sarat Chandra Rai Chaudhuri, Sasadhar Ray and
Pramatha Nath Banerjee* for the Respondents.

C. A. V.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the first defendant in a suit for recovery of possession of land upon declaration of title.

November, 14.

* Appeal from Appellate Decree No. 2028 of 1919, against the decree of Babu Kali Prasanna Sen, Subordinate Judge of Sylhet, dated the 21st July, 1919, modifying that of Babu Bhuvan Mohan Singh, Munsif of Habiganj, dated the 27th May, 1918.

(1) (1917) I. L. R. 44 Calc. 929; 26 C. L. J. 49 F. B.

(2) (1917) L. R. 44 I. A. 218; I. L. R. 45 Calc. 94; 26 C. L. J. 572.

The disputed lands are described in two of the schedules attached to the plaint, namely, the homestead lands in the second schedule and the chara or paddy lands in the fourth schedule. The lands originally belonged to a family of Nags, and are claimed by the plaintiffs under title by purchase. The trial Court dismissed the claim in respect of the homestead lands and decreed the claim in respect of a share of the paddy lands. Both the parties were dissatisfied with this decision; the first plaintiff preferred an appeal, and the first defendant filed a cross appeal. The Subordinate Judge varied the decree of the primary Court in favour of the plaintiffs and dismissed the cross appeal. The result was that the decree of the Subordinate Judge gave the plaintiffs a decree in respect of the homestead land and share of paddy land which belonged originally to Gopal Chandra Nag, in addition to what had been awarded by the Court of first instance. This decree is now assailed by the first defendant as erroneous in law. The appeal was heard on the 24th January, 1922 by Greaves and Cuming, JJ., who made an order under O. 41, R. 25 for investigation of three questions which appeared to them essential to the right decision of the suit upon the merits, namely, first, whether the conveyance by Gopal Chandra Nag, dated the 18th January 1917, which is the root of the title of the plaintiffs, is a genuine document or not; secondly, whether the claim is barred by limitation; and, thirdly, whether the claim is barred by estoppel. The Subordinate Judge has returned his findings and the reasons therefor, and the appeal has now been placed before us for determination under O. 41, R. 26.

A preliminary objection has been taken on behalf of the plaintiffs respondents that the matters in controversy are concluded by the findings contained in the judgment of the Subordinate Judge now under appeal, and that it was not open to Greaves and Cuming JJ. to make an order under O. 41, R. 25. The appellant has urged that the respondents are not competent to take up this position and to invite the Court in substance to review the order previously made. In this connection, our attention has been drawn by the respondents to *Hiatunnessa v. Kailash Chandra* (1); *Ganendra Nath v. Surya Kant* (2); *E. I. Ry. Co. v. Changay Khan* (3), and *Mubarak Husain v. Bihari* (4). In each of these cases, an order of reference was made by a single Judge under O. 21, R. 25 of the

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(1) (1905) 16 C. L. J. 259.

(2) (1912) 17 C. W. N. 462.

(3) (1915) 22 C. L. J. 212; 1 L. R. 42 Calc. 888; 19 C. W. N. 1034.

(4) (1894) 1 L. R. 16 All. 306.

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Code of 1908 or the corresponding provision (section 566) of the Code of 1882, and it was ruled that when the appeal came to be heard ultimately by a Bench of two Judges, that Bench was not bound by the opinion expressed by the single Judge. This view has been defended before us on the ground that if, on receipt of the finding, the case had been determined by a single Judge on the assumption that he was bound by the order previously made, the entire case would have been open for reconsideration in an appeal under the Letters Patent before a Bench of two Judges. The same explanation, however, is not available in justification of the decisions in *Hanuman Das v. Gursahay* (1) and *Lachman Prasad v. Jamna Prasad* (2); in each of these cases, the order for further finding was made by a Bench of two Judges, and the appeal was determined, after return of the findings, by another Bench of two Judges. Neither of these decisions, however, can be treated as an authority for the proposition that an order under O. 41, R. 25 once made and carried out can be subsequently pronounced to have been erroneously made. In *Hanuman v. Gursahay* (1), a new aspect of the matters in controversy was, at the final stage, placed before the Court, which had escaped notice at the time when the order for further finding was made. In *Lachman Prasad v. Jamna Prasad* (2) the findings on remand and the objections thereto were in fact considered before the final judgment was pronounced. We are of opinion that it cannot, as a matter of principle, be affirmed broadly that when an order has been made under O. 41, R. 25, the Court called upon to determine the appeal finally under O. 41, R. 26 is competent to treat the order as erroneously made. No doubt, as pointed out in *Boncharee v. Ainooddeen* (3), when an order has been made under O. 41, R. 25, the appeal remains pending and undisposed of on the file of the Court. The order, however, whether rightly or wrongly made, is an order made with jurisdiction; its validity may be attacked on review, but till it has not been set aside in an appropriate proceeding, it must be treated as an interlocutory order which is operative in law: *Hook v. Administrator-General of Bengal* (4); *Ram Kirpal v. Rup Kuari* (5). There can be no controversy that if the order had been made under O. 41, R. 23, its propriety could not have been challenged in an appeal

(1) (1909) 18 C. L. J. 181.

(2) (1887) I. L. R. 10 All. 162.

(3) (1875) 24 W. R. 137.

(4) (1921) L. R. 48 I. A. 187; I. L. R. 48 Calc. 479; 33 C. L. J. 405.

(5) (1883) L. R. 11 I. A. 37; I. L. R. 6 All. 269.

against the final decree made after remand : *Ramkumarbai v. Damodhar* (1) ; *Brojo v. Juggut* (2) *Gungaram v. Junmajoy* (3) ; *Suraj Din v. Chattar* (4) ; *Latchumammal v. Gangammal* (5). The same principle is applicable here, subject to the obvious reservation that as the appeal remains pending, the ultimate decision must be based upon a consideration of all the findings before and after the order under O. 41, R. 25. This, indeed, is plain from the language used by the legislature in O. 41, R. 26. The evidence and findings become part of the record in the suit, and when the Court proceeds to determine the appeal, such determination must be based upon all the materials on the record ; these include whatever was part of the record as it stood before the order under O. 41, R. 25 was made, as also what has been added in the Court of appeal, namely, the order together with the evidence taken pursuant thereto and the reasoned findings thereon. No portion of the record can be disregarded, and neither the order nor the materials placed on the record on the basis thereof can be rejected as if brought in without lawful authority. This view is in accord with that adopted in *Official Assignee v. Bidyasundari* (6). We may add that we do not overlook that when a finding is directed upon one or more of several inter-related points, there is a possibility that the new finding may, specially where based on new evidence, not harmonise with the other findings. This would not embarrass the Court in a first appeal, where the entire evidence may be examined, as in the case just mentioned ; but it may create a real difficulty in second appeals, where the Court is competent to examine the evidence only to the limited extent mentioned in section 103. This would seem to point to the conclusion that in a second appeal, involving several points difficult to disentangle, the appropriate course to follow is to make, not an order under O. 41, R. 25, but an order of remand in the exercise of inherent power of the Court : *Ghuznavi v. Allahabad Bank* (7) ; *Brij Indur v. Kanshi Ram* (8).

We have next to consider the result of the application of these principles to the case before us. In respect of the share of Broja Gobinda Nag and Krishna Gobinda Nag, the claim was dismissed by both the Courts below, and we are not concerned with the point in

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Mookerjee, J.

(1) (1869) 6 Bom. H. C. R. 146 A. C. J.

(2) (1874) 21 W. R. 199.

(3) (1877) 1 C. L. R. 144.

(4) (1881) 1 L. R. 3 All. 755.

(5) (1910) 1 L. R. 34 Mad. 72.

(6) (1919) 30 C. L. J. 428 ; 24 C. W. N. 145.

(7) (1917) 1 L. R. 44 Calc. 929 ; 26 C. L. J. 49 F. B.

(8) (1917) L. R. 44 L. A. 218 ; 1 L. R. 45 Calc. 94 ; 26 C. L. J. 572.

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the present appeal. Here we have to deal with the share of Gopal Chandra Nag. The plaintiffs claimed title thereto under a conveyance dated the 18th January, 1917. The defendants contended that the conveyance was without consideration and passed no title. The Court of first instance found against the plaintiffs on this point. The Subordinate Judge held that it was not open to the defendants to raise the question of consideration, and in support of this view, he relied upon the decision of the Judicial Committee in *Lal Achalram v. Raja Kasim Hossain* (1). Greaves and Cuming, JJ. held that the decision mentioned did not apply, and directed the lower appellate Court to come to an express finding as to the true character of the conveyance. The Subordinate Judge has now found that there was no consideration, that the transaction was fictitious, and that title was not intended to pass. This conclusion makes it manifest that the decision in *Lal Achalram v. Raja Kasim Hossain* (1) has no application. The principle enunciated by the Judicial Committee that a stranger to a deed, which is intended to be real and operative between the parties thereto, cannot dispute the payment or non-payment of consideration, its adequacy or inadequacy, has no bearing in a case where a deed is challenged as fictitious, never designed to operate as a real deed or to effect a transfer of the title. We hold accordingly that the conveyance of the 18th January, 1917, did not vest in the plaintiffs the title to the share which originally belonged to Gopal Chandra Nag. In this view, it is superfluous to consider, whether the claim to that share is or is not barred by limitation or estoppel. But we may add that we were not impressed by the argument of the respondents that the findings of the Subordinate Judge on these points were so clear as to render unnecessary an order under O. 41, R. 25. It cannot be denied that the Subordinate Judge had not distinguished between the question of limitation as applicable to the claim put forward by the plaintiffs and the question of acquisition of title by adverse possession by the defendants or their predecessors. We must further bear in mind that questions of title and possession cannot always be properly considered piecemeal as disconnected fragments. We are consequently of opinion that the decree of the Subordinate Judge in so far as it varied the decree of the trial Court cannot be supported, although it cannot be successfully attacked, either as to title or as to limitation, in so far as it allowed a part of the claim for the paddy land.

(1) (1905) L. R. 32 I. A. 113; I. L. R. 27 All. 271.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside, and that of the Court of first instance restored. This order will carry costs, both here and in the lower appellate Court.

A. T. M.

Appeal allowed.

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Mookerjee, J.

CRIMINAL REVISION.

Before Mr. Justice Newbould and Mr. Justice Sukrawardy.

KANAI LAL DAS AND OTHERS

v.

HYDER ALI KHAN PANI.*

CRIMINAL.

1922.

November, 22.

Judgment—Criminal Procedure Code (Act V of 1848), Sec. 146—Omission to give reason.

No hard and fast rule can be laid down when High Court should interfere on the ground of the brevity of the order passed under section 146 of the Code of Criminal Procedure.

An order under section 146 of the Code of Criminal Procedure ran as follows :
“ I am unable to satisfy myself as to which of the parties is in possession of the land”:

Held, that the omission to write at length the reasons for coming to such a conclusion was not a ground for remanding the case, as the High Court considered that the Magistrate gave full consideration to the evidence before he came to the conclusion at which he arrived.

Application for Revision under section 435 of the Code of Criminal Procedure by the Second Party.

Babus Bir Bhusan Dutt (for Babu Profulla Chandra Chakravarty) and Nripendra Chandra Das for the Petitioners.

Babus Surendra Nath Guha and Charu Chandra Biswas for the Opposite Party.

The judgment of the Court was as follows :

In this case the learned Magistrate has passed an order under section 146 of the Code of Criminal Procedure after recording a

November, 22.

* Criminal Revision No. 616 of 1922, against the order of Babu B. K. Bose, Sub-Deputy Magistrate of Serajganj, dated the 16th May, 1922.

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very short order in which he states that he is unable to satisfy himself as to which of the parties is in possession of the land. Several rulings have been brought to our notice in which it has been held by this Court that the omission to write at length the reasons for coming to such a conclusion may be a ground for remanding a case. It is impossible to lay down a hard and fast rule when this Court should interfere on the ground of the brevity of the order passed in a proceeding of this kind. In the present case it is sufficient for us to say that we see no reason to think that the learned Magistrate did not give full judicial consideration to the evidence before he came to the conclusion at which he arrived. This being so there is no reason for our interference. The Rule is discharged.

A. T. M.

Rule discharged.

Before Mr. Justice Newbould, and Mr. Justice Sukrawardy.

SYED SADEK REZA

v.

SACHINDRA NATH ROY AND OTHERS*

CRIMINAL.

1922.

November, 17, 21.

Jurisdiction—Criminal Procedure Code (Act V of 1898), Secs. 145, 350, proviso (a)—Decision under Survey and Settlement Act—Entry in record-of-rights—presumption.

Per Newbould J: A Magistrate in deciding a case under section 145 of the Code of Criminal Procedure can go behind the orders passed in favour of the petitioner under the Survey and Settlement Act and under the Bengal Tenancy Act, based on the survey proceedings.

Per Sukrawardy J: As the claim of the petitioner in the disputed land on the decision of the case under the Survey and Settlement Act was not established, the Magistrate had jurisdiction to find which party was in possession under section 145 of the Code of Criminal Procedure.

Per Newbould J: Though the Magistrate has not expressly stated that the presumption arising from entry in the record-of-rights has been rebutted, his order under section 145 of the Code of Criminal Procedure is not without jurisdiction.

The Magistrate who passed the order under section 145, did not himself record

* Criminal Revision No. 672 of 1922, against the order of the Deputy Magistrate of Malda, dated the 13th July, 1922.

the whole of the evidence. He based his decision partly on the evidence recorded by another Magistrate before whom the proceedings were commenced :

Held, that the second Magistrate had jurisdiction to proceed with the case, the proviso (a) to section 350 of the Code of Criminal Procedure did not compel him to start enquiry *de novo* when an application to that effect was made on behalf of the petitioner.

The application of proviso (a) to section 350 of the Code of Criminal Procedure is limited to criminal trial and is not extended to enquiries which are also covered by the first portion of the section.

Application for Revision under section 435 of the Code of Criminal Procedure by a member of the Second Party.

Proceeding under section 145 of the Code of Criminal Procedure.

The material facts appear from the judgment of Newbould J.

Babus Manmatha Nath Mukherjee and *Hemendra Kumar Das* for the Petitioner.

Babus Narendra Kumar Boss and *Anilendra Nath Roy Chowdhury* for Opposite Party No. 14.

Babus Dasarathi Sanyal and *Priya Nath Dutt* for Opposite Parties Nos. 94, 98, 115.

The judgments of the Court were as follows :

Newbould J.—This Rule is directed against an order passed under section 145 Cr. P. C. declaring the first party to be in possession of certain land. The petitioner in this case is a member of the second party. It is strongly contested on his behalf that the Magistrate had no jurisdiction to go behind the orders passed in his favour both under the Survey Act and under the Bengal Tenancy Act. We are unable to hold that in deciding as he has done the Magistrate acted either without jurisdiction or with such irregularity as would justify our setting aside his order in the exercise of our powers under the Government of India Act.

The main contention is that these orders in the petitioner's favour were binding on the Magistrate and he was bound to hold that after the decision in the proceeding under the Survey Act the second party were in possession. It is said that there was no finding that there has been any change of relationship at that time. But the finding that the first party are now in possession is in itself a finding of change of relationship since the decision under the Survey Act. As regards the entry in the record-of-rights on which great reliance is placed it appears that this entry was based entirely on the survey proceedings. The Magistrate's order cannot be said

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Newbould, J.

to have been made without jurisdiction because he has not expressly stated that the presumption arising from this entry has been rebutted. His finding is in fact a finding that the presumption has been rebutted. It is not for us to say whether the Magistrate's decision on the evidence before him was right or wrong. There can be no doubt that such evidence as there was before him was fully considered and he has come to a definite finding and he had jurisdiction to come to that finding.

One other point was taken with regard to the magistrate's jurisdiction and this is based on section 350 of the Code of Criminal Procedure. The Magistrate who passed the order did not himself record the whole of the evidence. He based his decision partly on the evidence recorded by another magistrate before whom the proceedings were commenced. We hold that though the main portion of section 350 is sufficient to give the second Magistrate jurisdiction to proceed with the case the proviso to that section did not compel him to start the enquiry *de novo* when an application to that effect was made on behalf of the second party. The wording of the principal clause of section 350 is very different from that in proviso (a). In the main body reference is made to an enquiry or trial: proviso (a) is limited to trial and also makes reference to an accused, a word which does not appear in the preceding part of the section. We have no doubt that the intention of the legislature was to limit the application of proviso (a) to criminal trial and not to extend that proviso to enquiries which are also covered by the first portion of the section.

I hold therefore that the contentions raised on behalf of the petitioner fail and I accordingly discharge this Rule.

Suhrawardy J:—I agree. I desire to rest my judgment on the observation made by the trying Magistrate in his explanation submitted to this Court which finds some support from his judgment, viz., "that according to the map prepared by the pleader commissioner the revenue survey line which is shown in full red passes by the west of the eastern boundary line of the disputed land; so the claim by the second party in the disputed land on the decision of the case under section 41 of the Survey and Settlement Act has not been established." Were it otherwise, I would have, in the circumstances of this case, had considerable hesitation in upholding the Magistrate's order under section 145 Cr. P. C.

A. T. M.

Rule discharged.

PRIVY COUNCIL.

PRESENT :—*Lord Dunedin, Lord Phillimore, Sir John Edge
and Mr. Ameer Ali.*

KHATUBAI

v.

MAHOMED HAJI ABU AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

*Mahomedan law—Porebunder Halai Memons—Succession and inheritance—
Exclusion of females—Custom—Cutchi Memons—'Memon', meaning of.*

Halai Memons domiciled in Porebunder State, though Mahomedans, are not governed by Mahomedan law as to succession and inheritance and females are excluded from succession by custom and practice in the community : *Abdurahim Haji Ismail Mithu v. Halimabai* (1) referred to.

There are among the Mahomedans certain groups whose ancestors were Hindus and professed the Hindu religion, and were then converted to Islam. Among these groups may be reckoned Khojas, Suni Borahs, Molesalam Girasias, Cutchi Memons, Nassapooria Memons and Halai Memons. With regard to the groups other than Halai Memons, the converts had retained their Hindu law relating to the exclusion of females from succession, and that law had been engrafted as a custom on the Mahomedan law although not in accordance with the rules of the Koran.

Memon means a convert. The name Memon, however, has not been applied to all branches of Hindu converts, e.g. as in the case of the Khojas. There was a body which came from Sind and settled in Cutch, and these have been denominated as Cutchi Memons. Another body from the same place settled in the Halai Prant of Kathiawar, and these have been designated Halai Memons. Some of the Halai Memons pushed on to Bombay, where they have formed a community known as the Bombay Halai Memons. There was also an immigration to Bombay from Cutch, and the Cutchi Memons formed by themselves a separate community in Bombay from the Halai Memons.

Appeal from a decree of the Bombay High Court reversing a decree of a single Judge of the same Court in its Original Civil Jurisdiction.

The parties are Halai Memons of Porebunder State. The only question in the appeal is whether the Halai Memons of Porebunder are governed by Mahomedan law or Hindu law as to matters of succession and inheritance.

The appellant (daughter of a Halai Memon of Porebunder) filed the present suit claiming a share under Mahomedan law, in the estate of her deceased father. The respondents resisted the

(1) (1915) L. R. 43 I. A. 35.

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claims on the ground that they are not governed by Mahomedan law but by a custom of excluding females from succession under Hindu law. The trial Judge held that the parties are governed by Mahomedan law and that the custom of succession according to Hindu law was not sufficiently proved so as to oust the general application of the Mahomedan law. He decreed the suit. On appeal, the High Court held that the custom of excluding females from succession under Hindu law was established and dismissed the appellant's claim. Hence the present appeal by the Plaintiff.

D. Gruyther K. C. and *Farwell* for the Appellant: The parties are Mahomedans. The succession to the estate is governed by Mahomedan law. A custom contrary to this requires to be an ancient and invariable claim and has to be established by clear and unambiguous evidence. There is no such evidence here. The decisions of Porebunder Courts as to the existence of a valid custom to that effect are conflicting and cannot be relied upon. Though the parties are domiciled in the Porebunder State, the succession to immovable property in Bombay is to be governed by the law as administered in Bombay. In Bombay it is well established that the Halai Memons in Bombay are governed by Mahomedan law as to succession. The result is that the appellant is entitled to succeed to her share under Mahomedan law.

Upjohn K. C. and *Raikes* for the Respondents argued *contra*.

The judgment of their Lordships was delivered by

Lord Dunedin: The present appeal relates to the succession of one, Haji Abu Haji Habib, who died intestate at Bombay on the 30th November, 1914. The contest is between a daughter, the plaintiff and appellant, on the one hand, and a son and other members of the family, the defendants and respondents, on the other, and depends entirely upon what is the law of succession to be applied to the property of the deceased.

Now, the deceased was a Mahomedan. Accordingly the Indian Succession Act does not apply, and if nothing more were known it would be obvious that the ordinary Mahomedan law of succession would fall to be applied, which would mean that the appellant would succeed. But the deceased was not what may be termed an ordinary Mahomedan. There are among the Mahomedans certain groups whose ancestors were Hindus and professed the Hindu religion, and were then converted to Islam. Among these groups may be reckoned, as is shown by decided cases, Khojas, Suni-Borahs, Molesalam Girasias, Cutchi Memons, Nassapooria Memons;

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and, lastly, Halai Memons, to which group the deceased belonged. Now, with regard to the groups other than Halai Memons, it has been held by a succession of cases beginning with a case decided by Sir Erskine Perry in 1847, that the converts had retained their Hindu law relating to the exclusion of females from succession, and that that law had been engrafted as a custom on the Mahomedan law, although not in accordance with the rules of the Koran. In the present case, as is said by the learned Chief Justice, an entirely novel question is raised, viz., What is the customary law governing succession to a non-Cutchi Memon of Porebunder? Both the learned Judge of first instance and the learned Judges of the appeal Court held that the deceased was, so to speak, a Porebunder and not a Bombay Memon. These being concurrent findings of fact, their Lordships, while entirely agreeing with them, need not examine the evidence on which they are founded. It follows that the personal law of the deceased, so far as the question for decision in the present appeal is concerned, was the law of a Halai Memon of Porebunder.

It may be here well to say a word as to what is meant by a Halai Memon. A Memon, as the word denotes, is a convert. The name Memon, however, has not been applied to all branches of Hindu converts, *e. g.*, as in the case of the Khojas. There was a body which came from Sind and settled in Cutch, and these have been denominated as Cutchi Memons. Another body from the same place settled in the Halai Prant of Kathiawar, and these have been designated Halai Memons. Some of the Halai Memons pushed on to Bombay, where they have formed a community known as the Bombay Halai Memons. There was also an immigration to Bombay from Cutch, and the Cutchi Memons formed by themselves a separate community in Bombay from the Halai Memons. Now, it is admitted that so far as the Bombay Halai Memons are concerned they have been content for many years to have their property distributed on succession according to the tenets of the Mahomedan law, so that if the deceased had been, in the proper sense of the word, a Bombay Halai Memon, the question of the succession would have been solved. But, as already stated, both Courts have found that he was not a Bombay Halai Memon, but a Porebunder Halai Memon. The question, therefore, is, Does a Halai Memon domiciled in Porebunder follow the Hindu or Mahomedan law with regard to the succession of females?

Voluminous evidence was taken which consisted of (1) the

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reports of a set of judgments of the Porebunder Courts—Porebunder being a Native State, from whose Courts there is no appeal either to any Appeal Court in India or to the King in Council ; (2) oral testimony from pleaders and from persons belonging to the community in Porebunder as to what the custom of succession was. The learned Judge of first instance, after a careful and elaborate judgment, came to the conclusion that the custom of succession according to Hindu law was not sufficiently proved so as to oust the general application of the Mahomedan law.

On appeal that judgment was reversed, and an equally careful and elaborate judgment pronounced by the learned Judges of the Court of appeal.

Their Lordships, after careful consideration, are in accordance with the views of the appeal Court. The learned trial Judge has, in their view, drawn a wrong inference from the fact that the Bombay Halai Memons follow the Mahomedan law, and they cannot help thinking that this inference has coloured his views on the whole case. Finding that these Bombay Halai Memons practise in the matter of succession the Mahomedan law, he has drawn the inference that when they came to Bombay from Kathiawar they brought that law with them, and that consequently the community which they left also followed the Mahomedan law. Their Lordships agree with Macleod J. that this is not a necessary inference. If it is otherwise shown that the Kathiawar Halai Memons practised the Hindu law excluding females from succession, it is equally easy to infer that the Bombay Memons, finding themselves among other Mahomedans who followed the Mahomedan law in its purity, renounced the custom of the Hindu law of succession in favour of the orthodox tenets of their own religion. An example of this may be found in the case of *Abdurahim Haji Ismail Mithu v. Halimabai* (1), (the Mombasa case). Of course, this is not an inference which itself need necessarily be drawn, but it counter-balances the other, and matters are, therefore, left as they were, viz., to depend on an enquiry as to what has been *de facto* the practice of the Halai Memons in Porebunder.

The decisions of the Porebunder Courts are minutely examined by Macleod J. The most that can be said for the appellant was reduced in the cross-examination of her chief witness to this :—

“ In Porebunder there is a conflict of decision, but the latest is

(1) (1915) L. R. 43 I. A. 35.

that Hindu law governs Halai Memons. That is the decision of the final Court of appeal there—the Huzur Court.”

It has been objected to this last and most authoritative decision—for it was the decision of the highest tribunal in Porebunder—that it is based on a misreading of the Mombasa case. It probably does go too far in thinking that their Lordships in that case laid it down as a general proposition that all Memons necessarily follow Hindu law of succession. But that was not the only ground of judgment, and the judgment remains as the last of the Porebunder Courts.

Their Lordships, however, are not inclined to take the view that that settles the matter, for the enquiry is not as to what is the Porebunder law, but as to what is the Porebunder custom. But the judgments of the Courts are good as evidence, and they are borne out by the other evidence in the case. Here their Lordships are content to follow the result arrived at by Scott C.J., who after a most careful examination of the evidence sums it up thus:—

“On a consideration of all the cases above mentioned, the evidence seems to me to be all one way. Twenty-five cases are proved which indicate that Hindu law was applied and not Mahomedan law, and there is no clear case of the application of Mahomedan law among Memons settled at Porebunder.”

The learned counsel for the appellant directed criticism to the character of certain of the witnesses, but such criticism is of small avail in contrast with the overwhelming effect of the negative result alluded to by the Chief Justice, that there is no clear case of succession according to the Mahomedan law.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Waltons & Co. : Solicitors for the Appellant.

T. L. Wilson & Co : Solicitors for the Respondents.

K. V. L. N.

Appeal dismissed.

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Lord Dunedin.

PRESENT :—*Lord Buckmaster, Lord Atkinson, Lord Sumner,
Lord Carson and Sir John Edge.*

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SHANKAR GANESH DABIR

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
OF THE CENTRAL PROVINCES AND BERAR].

*Privy Council—Appeal—Special leave—Reasons for refusal—Practice—Pleader—
Cancellation of sanad—Court's discretion—Legal Practitioners Act, (XVIII
of 1879), S. 13 (f)—“Any other reasonable cause.”*

The established practice of the Privy Council in not giving reasons for their refusal of petitions for special leave is, departed from in this case as a matter of concession.

S. 13 (f) of the Legal Practitioners Act of 1879 is not confined to acts done in a professional capacity and Courts have a discretion in dealing with the pleader for any such acts.

Petition for special leave to appeal against an order of the Judicial Commissioner of the Central Provinces and Berar cancelling the Sanad of the petitioner as pleader of that Court.

The petitioner was on the roll of legal practitioners of the Court of the Judicial Commissioner and practised at Basim in Berar. In Berar there was a tax called Mahar Baluta, a part of the land revenue. In March 1921, the Legislative Council of Berar passed a resolution recommending the Government to abolish the tax. The petitioner took an active part in the agitation against the continuance of the tax and made speeches. The Sub-divisional Magistrate at Basim, acting under section 107 of the Code of Criminal Procedure bound over the petitioner to keep the peace for one year. This order was confirmed by the District Magistrate and the Court of the Judicial Commissioner. The petitioner executed the bond under protest.

The Court of the Judicial Commissioner directed the petitioner to appear before that Court to show cause why he should not be dealt with under section 13 of the Legal Practitioners Act. The Rule was heard by two Judges of the Court who held that the petitioner's conduct was incompatible with his obvious duties and responsibilities as an official of the Court. As the petitioner had already suspended practice, they thought that suspension from practice was not a sufficient punishment and cancelled his sanad until

such time as the petitioner would satisfy by his future conduct that he is fit for re-admission.

The petitioner applied for special leave to appeal against this order.

Dube for the Petitioner: The petitioner was not guilty of any professional misconduct as specified in clauses (a) to (e) of section 13 of the Legal Practitioners Act. "Any other reasonable cause" in clause (f) means something *ejusdem generis* with the causes mentioned in the previous clauses or a cause which amounts to moral turpitude: *In re Wallace* (1); *In re Koylash Nath Chowdhry* (2). The petitioner's conduct did not come within either of the above categories. The Court had no jurisdiction to deal with the petitioner under section 13 of the Act. The agitation carried on by the petitioner was justified by the resolution of the Legislative Council. There was nothing in his conduct to render him unfit to practise as a pleader. The order cannot stand. This is a fit case to grant special leave to appeal.

Kemworthy Brown for the Respondent: The Court had jurisdiction under section 13 of the Legal Practitioners Act and it is entirely a matter of discretion. The Board does not interfere with the exercise of such discretion unless strong cause is made out. The Act is intended to maintain the discipline amongst those who appear in the Courts. Section 13 (f) is not confined to cases of professional misconduct: *Le Mesurier v. Wajid Hossain* (3).

Dube replied.

The judgment of their Lordships was delivered by

Lord Buckmaster: As a concession to the urgent request of counsel, their Lordships will briefly state the reasons why they are not able to advise that leave to appeal should be granted to the petitioner, but this indulgence must not be taken as recognising any departure from established practice, nor affording any precedent for the future. In expressing the opinion which they hold that this petition ought to be refused, their Lordships expressly desire to make plain that their opinion carries with it no approval of or reflection upon the order against which leave to appeal is sought. That order was entirely one for the discretion of the Court that made it, and the only matter that it has been necessary to consider is whether a *prima facie* case has been made out to establish that there was no

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(1) (1866) L. R. 1 P. C. 283.

(2) (1871) 16 W. R. Cr. 41.

(3) (1903) I. L. R. 29 Calc. 890 F. B.

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foundation upon which that discretion could properly repose. It appears that the petitioner was, on the 3rd May, 1921, bound over by the Sub-divisional Magistrate at Basim to keep the peace for a period of one year, and that order was confirmed by the District Magistrate and by the Court of the Judicial Commissioner. The offence which he had committed was connected with an agitation against payment of the *Mahar Baluta*, and it appears that in the course of such agitation he did not confine himself to protests, however vehement, against the tax, or against its injustice, but that he urged an organised resistance to payment, and attempted to establish a system which would have impeded and might have defeated its recovery with grave danger to the public peace. These considerations led to the conviction to which reference has been made, and caused his conduct as a pleader to be brought before the Court in their jurisdiction under the Legal Practitioners Act of 1879. Their Lordships are of opinion that the circumstances to which they have referred were sufficient to found jurisdiction under section 13, sub-section (f) of that Act, which is not confined to acts done in a professional capacity, and for these reasons they think that no leave to appeal ought to be granted in this case, and they will humbly advise His Majesty accordingly.

E. Dalgado : Solicitor for the Petitioner.

Solicitor, India Office : Solicitor for Respondent.

K. V. L. N.

Petition dismissed.

APPELLATE CIVIL.

Before Mr. Justice Cuming and Mr. Justice Panton.

KRISHNADAS ACHARJEE CHOWDHURY AND OTHERS

v.

SAMSAN ALI SHEIKH AND OTHERS.*

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April, 6.

Appeal—Original order of Special Judge—Bengal Tenancy Act (VIII of 1885) Sec. 109 A.

An appeal lies from an original order of a Special Judge, refusing to set aside an abatement of appeal, and section 109 A of the Bengal Tenancy Act is no bar. *Manmatha v Gadadhar* (1) followed.

Appeal by the Plaintiffs.

Suit under section 105 of the Bengal Tenancy Act.

The material facts appear from the judgment.

Babus Jogesh Chunder Roy and *Prokash Chunder Majumdar* for the Appellants.

Babu Ramendra Mohan Majumdar for the Respondents.

The judgment of the Court was as follows :

A preliminary objection was made that no appeal lies to this Court. The argument put forward was that this is an order passed by the Special Judge. The only section which applies to appeals from Special Judge is section 109 A of the Bengal Tenancy Act, and that as section 109 A applies only to appeals from appellate orders, and as this is not an appeal from appellate order but from an order no appeal lies ; and in support of this contention he has relied on the rulings in *Mothur v. Tara Sunkar* (2), and *Mathura v. Basanta* (3). As against this the appellant has relied upon the ruling in *Manmatha v. Gadadhar* (1). This latter case is similar in many respects to the present case. In view of this authority we are of opinion that the appeal does lie in the present case.

This is an appeal from an order refusing to set aside the abatement of an appeal. The facts appear to be these. The plaintiffs who are the appellants before this Court brought a suit under section 105 of the Bengal Tenancy Act before the Assistant Settlement Officer. This suit was dismissed and the plaintiffs appealed

*Appeal from Original Order No. 368 of 1920, against the order of F. W. Ward Esq., Special Judge of Mymensingh, dated the 13th August, 1920.

(1) (1917) 1. L. R. 45 Calc. 638.

(2) (1903) 7. C. W. N. 440.

(3) (1908) 1. L. R. 36 Calc. 510.

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to the Special Judge. While the appeal was pending, on the 15th May the pleader for the respondents Nos. 22 and 25 informed the Court that the respondent No. 1 had died in the month of Pous and respondent No. 5 died in the month of Aghran. On the 15th June, the appellants put in an application for substitution of certain persons in the place of respondent No. 1 and respondent No. 5, and the learned Special Judge passed the following order: "No. 5 died in Aghran last; six months having elapsed the appeal abates in respect of respondent No. 5. Respondent No. 1 was reported to have died in Pous last. Substitution be made in his place." Against the order of abatement in the case of respondent No. 5 the appellants moved the Special Judge and the Special Judge passed the following order on the 13th August, 1920: "Heard the pleaders. It is argued that appellant had sufficient ground under section 5 of the Limitation Act for not substituting the respondent. But I find in fact that they let two dates fixed for hearing pass after they had been informed of the death before they attempted to make the substitution. The application is rejected."

We think on looking at the facts of the case that the order of abatement was improperly made and the learned Special Judge should have granted the application to set aside the order of abatement. There was no material before the Court to justify the Court in holding that the appeal had abated against the respondent No. 5. There was no evidence to show and no allegation as to what date in Aghran the respondent No. 5 died. Had respondent No. 5 died in the last date of Aghran which corresponds to 16th December the application for substitution of his heirs which was made on the 15th June would be within time. The learned Special Judge was not justified in assuming that the respondent did not die on the last date of Aghran.

The appeal will therefore succeed and the order of the 13th August 1920 refusing to set aside the abatement will be set aside and the abatement will be set aside and the appeal will be restored and the heirs of the deceased respondent No. 5 will be substituted in his place.

The appellants are entitled to their costs in both Courts. We assess the hearing fee in this Court at one gold mohur.

A. T. M.

Appeal allowed.

Before Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

RAJENDRA NARAIN CHOWDHURI

v.

KHAN BAHADUR MOULVI ABU NASAR AHIYA.*

Putni—Creation of putni interest between zemindari and putni—Sale of such interest under Putni Regulation, if valid—Sale, if can be questioned collaterally.

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A putni tenure cannot be created over another putni. A zemindar can assign his right to receive rent from the putnidar.

The mere giving of the name of putni to the interest created between the zemindar and putnidar, does not make it a putni as contemplated by the Putni Regulation, so as to bring into play all the provisions of the law. A sale of such interest held under the Regulation is without jurisdiction and the purchaser acquires no title. Such a purchaser's right can be questioned by the defendant putnidar in a suit brought by him for rent : *Ramsona v. Sonamala* (1) distinguished.

Appeal by Defendant No 3.

Suit for rent.

The material facts appear from the judgment.

Babu Hemendra Kumar Das for the Appellant.

Babus Surendra Nath Guha and *Benoyendra Nath Palit* for the Respondent.

The judgments of the Court were as follows :

B. B. Ghose J.:—This appeal is by the defendant No. 3 and it arises out of a suit for rent brought by the plaintiff under the following circumstances. One Abdur Rahaman was the zemindar of a certain estate. He granted a putni lease of the entire 16 annas of the property to the predecessor of the defendants sometime in 1881. Subsequently, one Bhuban Babu acquired an interest in one anna share of the zemindary in 1895. After acquiring this interest, he created a putni in respect of this one anna share in favour of a lady Amatul Fatima Banu. Sometime after that, Bhuban Babu sold the interest of Amatul Fatima Banu under Regulation VIII of 1819 and

July, 18.

* Appeal from Appellate Decree No. 1533 of 1920, against the decree of Babu Hem Chandra Bose, Subordinate Judge, 2nd Court, of Sylhet, dated the 6th March, 1920, affirming that of Babu Sirish Chandra Chakravarty, Munsiff, 4th Court, of Habiganj, dated the 23rd December, 1918.

(1) (1911) 13 C. L. J. 404.

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B. B. Ghose, J.

it was purchased by the plaintiff. The plaintiff has now sued the defendants for rent of the putni to the extent of one anna share.

The defendant No. 3 alone contests the plaintiff's claim and he denies the relationship of landlord and tenant and contends that the plaintiff has acquired no interest in the property entitling him to recover rent from him as putnidar.

Both the Courts below have given the plaintiff a decree for rent. The learned Subordinate Judge relies upon the case of *Raj Kumar v. Probal* (1) for the proposition that it was open to Bhuban Babu to create a putni tenure over the head of the putni of the defendants.

It is contended before us by the appellant, first, that Bhuban Babu had no authority to create a second putni intervening between the defendant's putni and the zemindar's interest and, secondly, that assuming that the putni lease granted in favour of Fatima Banu — the plaintiff's predecessor amounted to an assignment of the right of the zemindar to recover rent from the defendants, such interest created in favour of Fatima Banu was not a putni lease as contemplated by Regulation VIII of 1819 and the sale held by the Collector under that Regulation of the interest of Fatima Banu at which the plaintiff purchased was without jurisdiction and the plaintiff has acquired no interest whatever by virtue of it. The appellant points out that there are certain other cases which deal with this question and he refers to the cases of *Madhu Sudan v. Debendra* (2); *Nilambar v. Mir Mohanuddin* (3); *Johar Mull v. Jalindra Nath* (4) and *Jarao Kumari v. Hanifuddin* (5).

With regard to the case of *Raj Kumar v. Probal* (1) in which the Subordinate Judge relies, the learned Judges who decided that case speak very guardedly about the position of a person who accepts a putni over the head of another putni. They say this: "The creation of two putnis one above the other no doubt introduces confusion into the ordinary grades and nomenclature of sub-infeudation; yet, for the purpose of this suit, all we hold is that the plaintiff's putni lease constitutes an intermediate tenure between the zemindar and the defendants and that, therefore, the plaintiff is entitled to demand the rent which the defendants are bound to pay to their superior landlord."

Apart from all authority, it would appear that the idea of a put-

(1) (1904) 9 C. W. N. 656. (2) (1908) 34 C. L. J. 76.

(3) (1914) 34 C. L. J. 77.

(4) (1921) 34 C. L. J. 79. (5) (1909) 14 C. W. N. 389.

ni being created over another putni is absolutely foreign to the scheme of the Putni Regulation and any one familiar with the status of a putnidar would consider this position as anomalous. In the Putni Regulation, a putnidar has been given certain rights as against the zemindar. The putnidar is described as a taluqdar of the first degree and it is difficult to imagine that a tenure can be created over a taluqdar of the first degree. There can, however, be no objection to the assignment of the right of the zemindar to receive rent from the putnidar which he is entitled to get under the putni settlement; for example, he may create an ijara or he may execute a mortgage and make over possession to the mortgagee. In such cases, the assignee of the zemindar's interest would be entitled to recover rent from the putnidar by virtue of the assignment. This position seems to have been made clear in the case of *Madhu Sudan v. Debendra* (1) where Mr. Justice Caspersz says that the name given to the assignee of the zemindar's interest to recover rent is immaterial. The case of *Johar Mull v. Jatin-dra* (2) does not really touch the question. That is a case in which the defendant claimed a Mokurari interest and the plaintiff sued for rent as a superior lessee under a lease creating a superior title over the mukuridar and it will be noticed that in that case, the learned Judges are equally guarded in their language as to the creation of a putni interest over another putni. In those cases, however, the plaintiff could recover rent on the basis of a title derived from the zemindar as assignee of the interest of the zemindar to recover rent from the putnidar. But in the present case, the position seems to be somewhat more complicated and one of the complications contemplated in the case of *Raj Kumar v. Probal* (3) has taken place. The Subordinate Judge finds that Bhuban after his purchase ignored the putni of the defendants and granted a new putni to Fatima Banu. Therefore, the interest which was created in favour of Fatima Banu by Bhuban was on the same plane as that of the defendants. It would appear, therefore, that Fatima Banu's interest was not superior to that of the defendants. Then, the question comes whether, assuming that it was a superior interest, this could be sold under Regulation VIII of 1819. The Collector assumed jurisdiction for the purpose of sale under that Regulation as the lease created in favour of Fatima Banu does not mention that the interest created in her favour was an interest between the putnidar and the zemindar. The Regula-

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(1) (1908) 34 C. L. J. 76. (2) (1921) 34 C. L. J. 79.

(3) (1904) 9 C. W. N. 656.

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tion does not contemplate the sale of such an interest under its provisions and, if it had been brought to the notice of the Collector that Fatima's interest was not that of an ordinary putnidar but that of one above a putnidar, the Collector surely would not have put the provisions of the Regulation in force to effect the sale as the revenue authorities do not recognise such a putni. The question, therefore, is whether the plaintiff has acquired any interest by such sale. Reference has been made on behalf of the respondent to the case of *Ramsona v. Sonamala* (1) in support of the proposition that a sale under the Regulation can only be questioned by a person entitled to do so under section 14 of the Regulation and that the title of the purchaser under the Regulation sale cannot be questioned collaterally. But the learned Judges in that case observed that the sale must be held with jurisdiction and the sole question in the present case is whether the Collector had jurisdiction to sell the interest of Fatima Banu under Regulation VIII of 1819. As has been contended by the learned vakil for the appellant, the defendants do not come under the category of persons who could sue under section 14 of the Putni Regulation for setting aside the putni sale. If they had brought such a suit, the obvious answer would have been that they were not affected by the alleged sale and that they had no right to dispute it nor could any person claiming under the defendants as dur-putnidar or a taluqdar of the third degree known as seputnidar have questioned the sale. If it were held that the interest of Fatima Banu was such as could be sold under Regulation VIII of 1819, serious complications would arise in the relation between the putnidar and the zemindar on the one hand and the subordinate tenure-holders on the other. It seems to me that the whole scheme of the Putni Regulation is that the putnidar is the only person whose interest can be sold under the Regulation and not the interest of a person in the position of Fatima Banu by whatever name it may be called. The mere giving of the name of putni to the interest of Fatima would not make it a putni as contemplated by the Regulation so as to bring into play all the provisions of the law. In my opinion therefore the sale under Regulation VIII of 1819 at which the plaintiff purchased was without jurisdiction and the plaintiff has acquired no title. Then again the intention of Bhuban Babu was to grant a new putni ignoring the putni of the defendants, as found by the Subordinate Judge, and it would appear that the interest created in favour of Fatima Banu was co-ordinate with that of the defendants. In that view,

(1) (1911) 13 C. L. J. 404.

Fatima Banu cannot be said to have acquired any interest as against the defendants. In my opinion, the plaintiff has no right to recover rent from the defendants and the relationship of landlord and tenant does not exist between the parties.

The appeal must, therefore, be allowed and the suit dismissed with costs in all Courts.

Walmsley J.—I agree.

A. T. M.

Appeal allowed : Suit dismissed.

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Execution sale—Fraud—Purchaser, title of—Purchaser for value and without notice, plea of, if can be taken in second appeal—Decree obtained by fraud—Sale, if invalid—Justice, equity and good conscience, applicability of.

Per Mookerjee, J : The plea of defence of purchase for value without notice is allowed to be raised in second appeal, though not specifically raised in the pleadings or in the issues, when it has been pleaded in substance and is a just inference from the facts alleged. The defect may be remedied by a remand on terms as to costs: *Taylor v Blakelock* (1).

Per Rankin J : From the circumstances of the case, the defence of purchaser for value without notice has no basis in the facts.

The fact that the Court has been successfully deceived is one which, upon the issue as to the purchaser's good faith, is of very different value in different circumstances.

Judicial sales fraudulently procured will not give a good title to a purchaser who does not take in good faith and without notice: *Chatambar v. Krishnappa* (2) explained.

The burden is on the purchaser to prove that he acted in good faith and without notice of fraud.

The rule is not that there is a special favour for every one until he is shown to have been dishonest or a volunteer, but that equity where it can will favour those

* Appeal from Appellate Decree No. 2033 of 1921, against the decree of Babu Banwari Lal Banerjee, Subordinate Judge of Hughli, dated the 3rd September, 1921, reversing that of Babu Hiran Chandra Mitra, Munsif of Howrah, dated the 31st January, 1920.

(1) (1886) 32 Ch. D. 560 (565); 56 L. J. Ch. 390.

(2) (1902) I. L. R. 26 Bom. 543.

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who show that in innocence they have given value: *In re Nisbit and Pott's Contract* (1).

Ter Mookerjee, J.: The protection given to the *bona fide* purchaser had its origin exclusively in equity and is based entirely upon the conception that a Court of equity acts solely upon the conscience of litigant parties, by compelling the defendant to do what, and only what, *in foro consciential*, he is bound to do. If the relations between the two contestants standing before the Court are such that, in equity and good conscience, the plaintiff ought to obtain the aid which he asks, and the defendant ought to do or suffer what is demanded of him, then the Court will interfere and grant the relief; if the relations are not of this character, then the Court will withhold its hand and will leave the parties where they stand. The protection given to the *bona fide* purchaser, therefore, simply means that from the relations subsisting between the two parties, specially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so; the Court will not, in such an event, aid either party against the other. The doctrine of *bona fide* purchase is thus not a rule of property. It does not determine the question of title between parties. It is in most cases available only by way of defence. It is a shield in the hands of a defendant, to protect him against the claim of his adversary. It means that equity will refuse to interfere to aid the plaintiff in his suit, because, under the circumstances of the case, it would be unconscionable that the plaintiff should have what he seeks to obtain. It enforces no right, but simply refuses to interfere in the plaintiff's behalf.

In all cases for which no specific statutory directions are given, Judges should act according to justice, equity and good conscience.

The decision of a case according to the principles of justice, equity and good conscience has generally meant decision according to the principles of English law applicable to a similar state of circumstances in this country: *Satis v. Ram Dayal* (2).

An execution sale, which has been brought about by fraud of the decree-holder, is liable to be set aside on that ground, by application to the execution Court, even though it is not established that the auction-purchaser, a stranger, has participated in or has been cognisant of the fraud: *Khiroda v. Jnanendra* (3) and other cases.

Subject to the conditions prescribed by order 21 rule 90 of the Code of Civil Procedure, an execution sale may be set aside on the ground of fraud precisely in the same manner as on the ground of irregularity, and that the exercise of this power by the Court is not excluded in cases where the purchaser falls within the category of *bona fide* purchaser for value without notice.

The rule that a stranger purchaser is not affected by the reversal of the decree for error or irregularity, is based on grounds of public policy.

Appeal by the Defendant.

(1) (1905) 1 Ch. 391.

(2) (1920) 1 L. R. 48 Calc. 388; 32 C. L. J. 94; 24 C. W. N. 982.

(3) (1901) 6 C. W. N. 283.

Suit for recovery of possession of the disputed land upon cancellation of the *ex parte* decrees and consequent execution sales, on the allegation that they had been brought about by fraud on the part of the defendant.

The material facts appear from the judgment of Mookerjee J.

Dr. Dwarka Nath Mitter, Babus Bhupendra Kumar Ghose and Pramatha Nath Banerjee for the Appellants.

Babu Manmatha Nath Roy for the Respondents.

C. A. V.

The judgments of the Court were as follows :

Mookerjee J : The subject matter of this litigation is a tract of land which was taken by the ancestors of the plaintiffs, on the 18th May, 1879, in Mourasi Mokarari tenancy right from a family of Ghoses. The plaintiffs, like their predecessors, were in possession by payment of rent to their landlords till they were dispossessed on the 13th February, 1917, by the first defendant who obtained delivery through Court on the allegation that he had purchased the land on the 21st November, 1916, in execution of a decree for arrears of rent. The plaintiffs made an ineffectual attempt at resistance, and their objection was rejected by the Court on the 11th June, 1917. On enquiry they ascertained what had happened to their tenancy, and the facts they discovered may be briefly narrated at this stage.

In 1904, the Ghoses sued the plaintiffs for arrears of rent and obtained an *ex parte* decree for Rs. 2-2-0. No further details are available, as the records of the rent suit have been destroyed in accordance with statutory rules. No application for execution of this decree appears to have been made till the 2nd August 1907 when proceedings were instituted for realisation of the decretal amount and Rs. 3-3-0 as costs. A sale was held on the 21st November, 1907 when one Beharilal Das, since deceased, was the sole bidder present and purchased the tenancy for a sum of Rs. 22. The sale was confirmed on the 30th January, 1908. The purchaser, however, never obtained delivery of possession through Court and never paid rent to the landlords. The result was that on the 14th April, 1913, the Ghoses instituted a suit against Soudamini Dasi, widow of Beharilal Das, for recovery of Rs. 15-7-6 as arrears of rent for four years from 14th April, 1909 to 13th April, 1913. The suit was decreed *ex parte* on the 24th June, 1913. A sale was held on the 21st November, 1916, when Bireswar Ghose, now appellant before us, became purchaser of the tenancy for a sum of Rs. 50. The sale was confirmed in due course ; and when the purchaser

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went to take possession, he came into conflict with the plaintiffs, as already stated. The plaintiffs thereupon instituted this suit, on the 31st May, 1918, for recovery of possession of the disputed land upon cancellation of the *ex parte* decrees and consequent execution sales, on the allegation that they had been brought about by fraud on the part of the Ghoses. According to the plaintiffs, the fraud consisted in the suppression of all notices in the suits and in the execution proceedings and the submission of false returns of service to the Court. The plaintiffs further suggested that the ostensible purchaser was, on each occasion, a creature of the Ghoses who had managed to purchase a valuable property for an insignificant price. The Ghoses, the purchaser at the second sale, as also the widow of the purchaser at the first sale, were all joined as defendants. The claim was, however, contested, on paper at any rate, by the second purchaser alone. He repudiated the charge of fraud and maintained that he had made the purchase on his own account. The Court of first instance held that the charge of fraud was not established by the evidence and dismissed the suit. Upon appeal, the Subordinate Judge has reversed that decision. He has held that the suits and execution proceedings were fraudulent, that all notices were suppressed both in the suits and in the execution proceedings, and that false returns of service were submitted to the Court by the officers concerned. In this view, the Subordinate Judge has held that the decrees and sales must be vacated and the property restored to the plaintiffs. On the present appeal, the second purchaser has urged that he is a *bona fide* purchaser for value without notice and is entitled to retain the property, even though the suits and execution proceedings be held to have been fraudulent. In support of this proposition, reliance has been placed upon the decision in *Chitambar v. Krishnappa* (1). The plaintiffs respondents have controverted this position, and have further contended that the defence of purchase for value without notice, even if available, should have been specifically alleged and proved. In support of this proposition, reference has been made to *A. G. v. Biphosphated Guano Co.* (2) and *In re Nisbet and Pott's Contract* (3). We have not thought it right to overrule the plea of defence of purchase for value without notice on the ground that the question was not specifically raised in the pleadings or in the issues; the defect may be remedied, if necessary, by a remand on terms as to

(1) (1902) I. L. R. 26 Bom. 543.

(2) (1879) 11 Ch. D. 327; 49 L. J. Ch. 68.

(3) (1905) 1 Ch. 391.

costs, specially as the defence has sometimes been entertained, when it has been pleaded in substance and is a just inference from the facts alleged : *Taylor v. Blackelock* (1). We shall consequently examine, whether the defendant has a substantial answer to the claim.

It may be stated at the outset that in a long line of cases in this Court the view has been maintained that an execution sale, which has been brought about by fraud of the decree-holder, is liable to be set aside on that ground, by application to the execution Court, even though it is not established that the auction-purchaser has participated in or has been cognizant of the fraud. Thus, in *Khirode Sundari v. Jnanendra Nath* (2), it was ruled that a judgment-debtor is entitled, by an application under section 244 of the Civil Procedure Code of 1882, to have an execution sale of his properties set aside, if he alleges and proves fraud on the part of the decree-holder, though no fraud is alleged or proved against the auction-purchaser who is a stranger to the suit. Maclean, C. J. treated this proposition as well settled by the decisions in *Nemai Chand v. Deno Nath* (3) ; *Rojoni Kant v. Hossainuddin* (4) and *Hira Lal v. Chundra Kant* (5). Banerjee, J. referred in addition to the decision in *Bhubon Mohun v. Nunda Lal* (6) and assigned the following reason in support of his conclusion : "The sale in execution of a decree is brought about by the instrumentality of the Court, the Court being set in motion by the decree-holder. If the decree-holder is guilty of fraud in the conduct of the sale, the process of the Court must be held to have been abused by him in bringing about the sale ; and it cannot be said that a sale obtained through the abuse of the process of the Court by the fraud of the decree-holder who set the Court in motion, should be upheld, merely because the auction-purchaser is innocent of the fraud. The auction-purchaser, of course, is entitled to have the purchase money paid by him refunded by the decree-holder ; but he cannot insist upon a sale, brought about by fraud practised upon the Court and by the decree-holder, being maintained." Banerjee, J. adhered to this view in *Hungsha v. Tinowri* (7), when he was pressed with the decision in *Mohesh Chunder v. Dwarka Nath* (8), in which it had been held that however fraudulent the con-

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(1) (1886) 32 Ch. D. 560 (565) ; 56 L. J. Ch. 390.

(2) (1901) 6 C. W. N. 283. (3) (1898) 2 C. W. N. 691.

(4) (1899) 4 C. W. N. 538.

(5) (1899) I. L. R. 26 Calc. 539 ; 3 C. W. N. 403.

(6) (1899) I. L. R. 26 Calc. 324 ; 3 C. W. N. 399.

(7) (1903) 8 C. W. N. 230. (8) (1875) 24 W. R. 260.

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duct of a plaintiff in a suit may be, if the purchaser is not implicated in the fraud, the validity of the sale cannot be affected by the badness of the decree in execution of which the sale took place. Banerjee, J. observed that even if this were conceded, a different rule should hold good where not only the decree but the execution proceedings are fraudulent. "If the sale is brought about fraudulently, that must be a sale brought about by abusing the process of the Court; and such a sale would be invalid, quite irrespective of the validity or invalidity of the decree, and the auction-purchaser cannot be entitled to maintain his purchase, notwithstanding that the proceedings by which he became a purchaser were fraudulent." This view was followed in *Ambika Prasad v. Whitewell* (1), which dissents from *Abbubaker v. Mohidin* (2), and refers to *Adhar Mani v. Monmotha Nath* (3). On the other hand, where the scope of the fraud is limited to the suit and does not pervade the execution proceedings as well, it has been held that an innocent purchaser, not a party to the fraud nor apprised thereof before he paid his money, would be protected: *Bishun Chand v. Bijoy Singh* (4); *Radha Madhab v. Kalpataru* (5).

There is thus a long and uniform series of decisions in this Court in support of the proposition that where an execution sale has been brought about by fraud practised on the Court by the decree-holder, the sale will be set aside on application to the execution Court, even though the auction-purchaser may not have participated in or may not have been cognisant of the fraud. This principle has received legislative approval in order 21, rule 90 of the Civil Procedure Code, 1908, where provision is made for cancellation of an execution sale on the ground of a material irregularity or fraud in publishing it, provided the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. Under section 311 of the Code of 1882, which was replaced by order 21, rule 90 of the Code of 1908, an execution sale could be set aside on the ground of material irregularity in publishing or conducting it, provided the applicant had sustained substantial injury therefrom. On this rule, the judicial decisions engrafted the principle that an execution sale might be set aside on the ground of fraud under section 244. The consequence was a three-fold distinction between the two classes of cases: (1) when fraud was

(1) (1907) 6 C. L. J. 111. (2) (1896) 1. L. R. 20 Mad. 10.

(3) (1901) 6 C. W. N. 279.

(4) (1911) 13 C. L. J. 583 P. C.; 15 C. W. N. 648 P. C.

(5) (1912) 17 C. L. J. 209.

established, no question of substantial injury arose ; (ii) the period of limitation governing an application for cancellation of a sale on the ground of fraud was three years, whereas the period governing an application based on the ground of irregularity was 30 days ; and (iii) the decision on an application for cancellation of a sale on the ground of fraud operated as a decree, subject to a first appeal and a second appeal, while the adjudication on an application founded on allegation of irregularity, operated as an order subject to a first appeal only. These differences have been obliterated by the Code of 1908, and the two classes of cases have been assimilated. The Code, be it noticed, does not exclude specifically the application of rule 90 in cases where the purchaser is a *bona fide* purchaser for value without notice of the irregularity or the fraud ; and our attention has not been drawn to any judicial pronouncement, except the dicta in *Paresh Nath v. Hari Charan* (1) to show that the Court should, in the application of the provisions of order 21, rule 90, have regard to the fact that the purchaser is a stranger to the proceedings. On the other hand, the statement contained in the referring order made by Pandit, J. on the 16th May, 1867, in the case of *Abdool Hye v. Nawab Raj* (2) shows that a sale may be set aside on the ground of irregularity, however innocent the purchaser. It must further be borne in mind that by virtue of section 18 of the Indian Limitation Act, which extends the period of limitation in cases of fraud, a sale may have to be set aside under order 21, rule 90, even though it may have been meanwhile confirmed under order 21, rule 92. The position, then, is that, subject to the conditions prescribed by order 21, rule 90, an execution sale may be set aside on the ground of fraud precisely in the same manner as on the ground of irregularity, and that the exercise of this power by the Court is not excluded in cases where the purchaser falls within the category of *bona fide* purchaser for value without notice. As Pandit, J. pointed out in the case mentioned, "a purchaser in execution is always an adventurer and knows that his purchase is attended with risk,"—the risk, amongst others, that his purchase may be nullified on the ground of material irregularity or fraud in publishing or conducting the sale.

We have next to consider the class of cases where the validity of an execution sale is impeached on the ground that the decree which is the foundation of the sale had been obtained by fraud. The question of the position of a *bona fide* purchaser for value without

(1) (1911) I. L. R. 38 Cal. 622 ; 15 C. W. N. 875.

(2) (1868) 9 W. R. 196 ; B. L. R. F. B. 911.

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notice, in this connection, was reserved by Sir Barnes Peacock, C. J. in delivering the judgment of the Full Bench in *Nilmani v. Fuddo Lochan* (1). In that case, as also in *Ramsundar v. Prasanna Kumar* (2), it was ruled that a suit lies in a civil Court to set aside a sale in execution of a decree fraudulently obtained in a revenue Court, under the Bengal Rent Recovery Act, 1859. This conclusion was rested on the ground that it is a cause of suit in the civil Courts, which have jurisdiction to administer the rules of equity, justice and good conscience, to set aside decrees obtained by fraud and to restrain the parties to the fraud from reaping the fruit of such decrees. Peacock, C. J. then added the following observation: "In this case, the revenue Court, upon review, set aside the judgment under which the tenure was sold, and passed a fresh judgment for a different amount. When that judgment was set aside, there was no judgment to support the sale which had taken place under it. It is unnecessary to say what would have been the effect of setting aside the decree under which the sale took place, if the purchaser at the sale had been a *bona fide* purchaser. It is sufficient to state that a decree set aside for fraud would not support a sale to a purchaser, in collusion with the parties to the fraud and acting as benami for one of them. This is the charge in the present case, and if the fraud alleged be made out, the plaintiff is entitled to relief." The question arose directly for decision in the case of *Abdool Hye v. Nawab Raj* (3). There, a decree was obtained against the appellant in the Court of Behar and was transferred for execution to the Court of Surajgarh. The judgment-debt was paid into Court at Behar on the 14th January, 1851. An intimation was sent to the Surajgarh Court that the decree had been satisfied and execution was no longer necessary. This, however, reached that Court after the sale had been held on the 3rd February, 1851, and the property had passed into the hands of a stranger. The judgment-debtor thereupon sued for cancellation of the sale. The trial Court dismissed the suit on the ground that the plaintiff had no right to bring the action, and this was confirmed by the lower appellate Court. Pandit, J. elaborately discussed the law on the subject, and with the approval of Bayley, J. referred the following question to a Full Bench for decision:

"Whether, with reference to objections urged by the purchaser, the sale should or should not be set aside, or, in other words,

(1) (1866) B. L. R. F. B. 379; 5 W. R. Act X 20.

(2) (1866) B. L. R. F. B. 382; 5 W. R. Act X 22.

(3) (1868) 9 W. R. 196; B. L. R. F. B. 911.

whether and how far in a regular suit, claims of a purchaser in execution of decrees are to be respected and protected on grounds of his innocence and ignorance."

Peacock, C.J. with the concurrence of Bayley, Seton Kerr, Phear and Macpherson, JJ. delivered the judgment of the Full Bench in the following terms :

"The substantial question of law which has been referred for the decision of the Full Bench is, whether, having reference to the cases mentioned in the order of reference, *In re Shumboomath Roy* (1) ; *In re Chundernath* (2) ; *In re Nadir* (3) ; *In re Gunga Pershad* (4) ; *Bootan v. Bhugwan* (5), a *bona fide* purchaser for valuable consideration and without notice, at a sale in execution of a decree, is protected from having the sale set aside, under the present or former law. We are of opinion that the decisions do not go to the extent of saying that, under no circumstances, can a sale be set aside as against a purchaser. In each case, it will be for the Court which tries the case, to determine whether it will be in accordance with the principles of justice, equity and good conscience, that the sale ought to be set aside or not. Each case must be determined by the Court upon its own merits."

It must be noted at this stage that no reference is made, either in the Order of Reference or in the judgment of the Full Bench, to a dictum of the Judicial Committee in *Lalla Bunseedhur v Koonwur Bindeseree* (6), decided on the 26th February, 1866, that is, after the judgment of the Full Bench in *Nilmoney v. Poddo Lochun*, (7), which was decided on the 5th February, 1866 and before the Order of Reference in *Abdool Hye v. Nawab Raj* (8) which was made on the 16th May, 1867. The appeal before the Judicial Committee arose out of a suit instituted by Bindeseree Dutt Singh to obtain cancellation of an agreement, made by his step-mother and late guardian, whereby debts and obligations were incurred by her, which led to a decree against his estate during his minority and a consequent judicial sale. The defendant judgment-creditor became the purchaser at that sale, and his title was impeached on the ground that the agreement, the decree, and the sale were fraudulent and collusive. The history of the transactions is set out at length in the

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(1) (1847) Carrau 117 ; 2 Sum. Rep. 94.

(2) (1841) Carrau 39.

(3) (1842) Carrau 71.

(4) (1842) Carrau 74.

(5) (1849) Beng. S. D. A. 283.

(6) (1866) 10 M. I. A. 454.

(7) (1866) 5 W. R. Act X. 20 ; B. L. R. F. B. 379.

(8) (1868) 9 W. R. 196.

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judgment of the Sudder Court pronounced in an appeal from the decision of the Principal Sudder Amin : *Lalla Bunseedhur v. Koonwar Bindeseree* (1). It was urged before the Sudder Court that the sale could not be reversed upon a late precedent of that Court : *Ali Hossain v. Badul Khan* (2). Roberts and Batten, JJ. overruled this contention in the following terms : " But there is this peculiarity in this case, that the vendee is not an innocent purchaser, but one who has caused the sale of the property by his own dishonest and artful agency. Such sales, we have no doubt, ought to be cancelled, as the law will not allow a party to take advantage of his own wrong." This view was assailed before the Judicial Committee, and it was argued that there was no evidence to show that there was fraud, and collusion between the guardian of the minor and the appellant or that the sale was prejudicial to the estate of the infant. Lord Chelmsford observed : "you get a cognovit for Rs. 54000 on an advance of Rs. 26,986, borrowed according to your argument to save the estate, but under that cognovit, or confession of judgment, you force a sale yourself and actually buy in the minor's estate : Can that stand ?" (3) Counsel for the appellant answered : "The sale was by public auction under a decree of Court, whereby the payment of the Rs. 26,986, advanced to save the estate, was decreed : If the transaction as to the *Ikrarnamah* fails, yet the Appellant was a purchaser at an execution sale and a decree-holder : His rights were similar to a stranger purchasing, *Ali Hossein v. Badel Khan* (4)." Counsel for the respondent urged that the whole transaction was shown by the evidence to be tainted with fraud ; he was stopped by Lord Chelmsford with the observation, "We are satisfied on that point (5)." The question, which the Judicial Committee was, in these circumstances, called upon to consider, was, whether the appellant could set up his purchase at the execution sale as a bar, though the entire transaction, which he himself had brought about, was tainted with fraud. Sir James Colvile held that the Courts below were warranted in their conclusion that the transaction was not only prejudicial to the estate, but had also the character of a fraudulent contrivance, and then added the following observation with reference to the question, whether the sale had interposed an effectual

(1) (1863) 2 N. W. P. Sud. Dec. 73.

(2) (1863) N. W. P. S. D. A. decided on 19th May.

(3) [*See* *Lalla Bunseedhur v. Koonwar Bindeseree* (1866) 10 M. I. A. at p. 459—Rep]

(4) [*See* page 459 of 10 M. I. A.—Rep].

(5) [*See* page 460 of 10 M. I. A.—Rep]

bar to the application of the more appropriate equity of restoration of the property to the minor than the remedy by appropriation of the surplus sale proceeds :

" Their Lordships concur with the learned Judges of the Sudder Court in dissenting from the authority of the case which is stated to have been decided in 1847 (1863 ?) by two out of three of the then Judges of the Sudder Court of the North-Western Provinces. The proposition that no difference is to be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale seems to them to be wholly untenable. The question is, in the former case, which of two innocent parties shall suffer ; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrongdoing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other. In the present case, the judgment by cognovit, the execution, and the sale are all tainted with the fraud which entered into the original transaction, the execution of the *ikrar*. All are parts of the contrivance by which the Respondent has been deprived of his property, and the Appellant has acquired it. Their Lordships, therefore, are of opinion that both the Courts below were right in decreeing that possession of the property should be restored to the Respondent." (1).

It is manifest that the Judicial Committee were not called upon to examine, whether a *bona fide* purchaser for value without notice was entitled to retain the property which has vested in him by the sale, even though the decree and sale were tainted with fraud. The question was, whether, on the assumption that an innocent purchaser was entitled to special protection, a fraudulent purchaser could be included in the same category. The answer was in the negative, and the reason assigned was that he who has wronged the other party cannot be allowed to enjoy the fruit of his wrongdoing. It may be conceded that even a dictum of the Judicial Committee is entitled to great respect, but we cannot altogether overlook the circumstances of the litigation where the pronouncement was made.

Let us return to the decision of the Full Bench in *Abdool Hye v. Nawab Raj* (2). The principle enunciated there was applied in *Jungte Lall v. Sham Lal Misser* (3). In that case, an *ex parte*

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(1) [See pp. 473 and 474 of 10 M. I. A.—Rep.]

(2) (1868) 9 W. R. 196 ; B. L. R. F. B. 911.

(3) (1873) 20 W. R. 120.

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decree was obtained against the infant members of a Mitakshara family under such circumstances that their interest in the estate could not be bound thereby. Before the decree was executed, the mother of the infants notified that she denied their liability and questioned the validity of the *ex parte* decree on the ground that they were not properly represented in that suit. Notwithstanding such notice, the defendants purchased the property at the execution sale. It was ruled by Markby and Birch, JJ. that the purchasers were not protected by a decree which, by reasonable diligence, they might have discovered to be invalid. In such circumstances, the purchasers could not invoke the principle of the decision in *Jan Ali v. Jan Ali* (1), where no question of fraud was raised, and it was ruled that a stranger who purchases in execution of a decree is not affected by the subsequent cancellation or reversal of the decree. The question came up for consideration again in *Mohesh Chunder v. Dwarka Nath* (2). There the suit was instituted to set aside an *ex parte* rent decree obtained under the Bengal Rent Recovery Act 1859, and an execution sale consequent thereon. The trial Court found that the entire proceedings—the suit, the decree and the sale—were fraudulent, and cancelled the decree and sale, commenting adversely on the conduct of the purchaser, who was a pleader and a stranger to the suit. Upon appeal, the District Judge dismissed the suit as barred by limitation. On second appeal to this Court, Jackson and McDonnell, JJ. held that the suit was not barred by limitation and remanded the case for retrial with special reference to the question, whether the defendant or any of them had been proved to have been implicated in the fraud, as found by the primary Court. It was observed that upon the authority of previously decided cases, it was clear that however fraudulent the conduct of the plaintiff in the rent suit might have been, if the purchaser was not implicated in the fraud, the validity of the sale would not be affected by the badness of the decree under which the sale took place. It may be stated that the previous decisions on the subject were neither mentioned nor discussed in the judgment. Amongst later decisions, reference has already been made above to the judgment of the Judicial Committee in *Bishun Chand v. Bijoy Singh* (3). There, a suit was brought to set aside an auction sale on the ground that it was brought about by the fraud of the decree-holder and the judgment-debtor, and

(1) (1868) 1 B. L. R. 56; 10 W. R. 154.

(2) (1875) 24 W. R. 260.

(3) (1911) 13 C. L. J. 588; 15 C. W. N. 645.

that the auction-purchaser was a benamdar of the judgment-debtor. The trial Court found these allegations established and set aside the sale. On appeal to this Court, that decree was affirmed, as a reasonably clear case of fraud and dishonesty, to which the purchaser was a party, had been made out. The Judicial Committee reversed the concurrent finding that the sale was fraudulent and collusive. Lord Robson held that the original debt and the decree thereon were genuine, that the auction-purchaser had made the purchase with his own money, and that the allegation of fraud and conspiracy made against the auction-purchaser had not been brought home to him. In such circumstances, the conclusion was inevitable that the sale could not be successfully impeached.

We have finally to consider the decision in *Chitambar v. Krishnappa* (1), where Jenkins, C.J. and Crowe, J. doubted the correctness of the Full Bench decision in *Abdool Hye v. Nawab Raj* (2), on the authority of the decisions in *Gore v. Stappole* (3); *Bowen v. Evans* (4); *Coldclough v. Bolger* (5); *Lalla Bunseedhur v. Koonwur Bindeseree* (6) and *Jan Ali v. Jan Ali* (7). We have already referred to the decisions in *Lalla Bunseedhur v. Koonwur Bindeseree* (8) and *Jan Ali v. Jan Ali* (7), and we shall presently consider the English and Irish decisions mentioned. We must not overlook, however, that the decision of the Full Bench is binding on us, until it is set aside by the Full Court or a contrary rule is enunciated by the Judicial Committee. The appellant has, indeed, invited us to hold that the Full Bench decision, which, so far as we know, has not been challenged in this Court since 1868, is erroneous. We are not prepared to accept this contention. The decision, as we have seen, does not lay down an inelastic or inflexible rule; on the other hand, it enables the Court to determine each case upon its own merits, and to decide whether, in accordance with the principles of justice, equity and good conscience, the sale should or should not be set aside as against the purchaser. The principle that, in all cases for which no specific statutory directions are given, Judges should act according to justice, equity and good conscience, was expressly formulated in section 93 of the Administration of Justice Regulation promulgated by the Governor-General in Council on the 5th July, 1781. The rule was thereafter successively reproduced in section

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(2) (1868) 9 W. R. 196; B. L. R. F. B. 911.

(3) (1813) 1 Dow. 18.

(4) (1844) 1 J. & L. 178 (257).

(5) (1816) 4 Dow. 54.

(6) (1866) 10 M. I. A. 454 (473).

(7) (1868) 1 B. L. R. 56.

(8) (1866) 10 M. I. A. 454.

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21 of Regulation III of 1793, in section 24 of the Bengal Civil Courts Act, 1871, and in section 37 of the Bengal Civil Courts Act, 1887. Now, the decision of a case according to the principles of justice, equity and good conscience has generally meant decision according to the principles of English law applicable to a similar state of circumstances. This was justified in *Dada v. Babaji* (1) mentioned by Jenkins C. J. in *Shivrao v. Pundlik* (2), on the authority of the judgment of the Judicial Committee in *Varden Seth v. Luckpathy* (3); but it is doubtful, whether the Judicial Committee really intended to enunciate the comprehensive rule attributed to their decision. Lord Hobhouse, however, in the later case of *Waghela v. Masludin* (4) stated that "equity and good conscience" had been "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances." See also *Rajah of Visianagram v. Rajah Setrucherla* (5); *Meenakshi v. Rama Aiyar* (6); *Govindan Nair v. Achutha Menon* (7); *Kripa Sindhu v. Annada Sundari* (8); *Gurdeo v. Chandrikah* (9). In this connection, reference may be made to the observation of Sir Barnes Peacock, C. J., in *Rambux v. Madoosoodhun* (10), that where rights of parties are determined according to the general principles of equity and justice, this must be done without any distinction, as in England, between that partial justice which is administered in the Courts of law and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of equity. This was adopted by Jenkins, C. J. in *Debnarayan v. Chunilal* (11); see also the observation of Peacock C. J. in *Khemamoyee v. Shushee Bhoosun* (12). In these circumstances, it is not surprising to find that where, as in the present instance, there is no statutory provision directly conclusive on the question of the rights and liabilities of the parties the only justice, equity and good conscience which Judges steeped in the principles of English jurisprudence can and do

(1) (1865) 2 Bom. H. C. R. 36 (38).

(2) (1902) I. L. R. 126 Bom. 437; 4 Bom. L. R. 90.

(3) (1862) 9 M. L. A. 303 (321).

(4) (1887) L. R. 14 I. A. 89 (66); I. L. R. 11 Bom. 551 (561).

(5) (1903) I. L. R. 26 Mad. 686; 13 M. L. J. 83.

(6) (1912) I. L. R. 37 Mad. 366; 24 M. L. J. 106.

(7) (1915) I. L. R. 39 Mad. 433; 28 M. L. J. 310.

(8) (1907) I. L. R. 35 Calc. 34 F. B.; 6 C. L. J. 273 F. B.

(9) (1907) I. L. R. 36 Calc. 193; 5 C. L. J. 611.

(10) (1867) B. L. R. F. B. 675 (679); 7 W. R. 377.

(11) (1913) I. L. R. 41 Calc. 137 (146); 18 C. L. J. 603.

(12) (1868) 9 W. R. 94 (96).

administer, in default of any other rule, is so much of English law and usage as seem reasonably applicable in this country : *Satis Chandra v. Ram Dayal* (11).

The principles applicable to cases of this character are concisely stated by Sir Edward Sugden (afterwards Lord St. Leonards) in his classical treatise on the law of Vendors and Purchasers (14th Ed. 1862, p. 110) :

"If a decree is obtained by fraud, it may be relieved against, and it has been said that a purchaser is bound to see that, at least as far as appears on the face of the proceedings before the Court, there is no fraud in the case ; but, if the Court itself be imposed upon, it would be strong measure to imply notice of the fraud to the purchaser, from the very proceedings before the Court. But it is a settled maxim that persons purchasing under decrees of the Court, as a general rule, are bound to see that the sale is made according to the decree. And this more specially applies to the plaintiff in the cause ; of course, the purchaser making use of the machinery of the Court to obtain the estate fraudulently as against the persons entitled to the inheritance, although with the concurrence of the tenant for life, cannot sustain his purchase ; but a *bona fide* sale cannot be impeached, simply because the suit was in fact instituted for the purpose of carrying it into execution. The tenant for life cannot be permitted in such a sale to obtain a benefit at the expense of the remainder-man, and if the purchaser permit him to do so, that may in some cases vitiate the sale, although the Court, if the transaction was not fraudulent, will struggle to correct the misapplication, and not rescind the sale."

The principles upon which a Court of equity acts in setting aside a sale had under a decree, were elaborately discussed by Sir Edward Sugden, when Lord Chancellor of Ireland, in the case of *Bowen v. Evans* (2) which was subsequently taken up to the House of Lords ; *Bowen v. Evans* (3). Reference was made to the decisions of Lord Redesdale in *Kennedy v. Daly* (4) and *Giffard v. Hort* (5) where purchases on the basis of fraudulent decrees were pronounced to be of no effect, as the purchaser was aware of, if not a party to, the fraud. To the same effect is the decision of Manners, L. C.

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(1) (1920) 1 L. R. 48 Calc. 388 ; 22 C. L. J. 94 ; 24 C. W. N. 382.

(2) (1844) 1 J. & L. 178 (257) ; 6 Ir. Eq. Rep. 562.

(3) (1848) 2 H. L. C. 257 ; 81 R. R. 136.

(4) (1804) 1 Sch. & Lef. 355 (377).

(5) (1804) 1 Sch. & Lef. 386 (399).

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in *Blake v. Foster* (1). On the other hand, in *Bennett v. Humill* (2) Lord Redesdale held that the purchaser was not affected by error in the decree and observed as follows: "A purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties, and that it has on that investigation properly decreed a sale; then he is to see that this is a decree binding the parties claiming the estate, that is, to see that all proper parties to be bound are before the Court; and he has further to see that taking the conveyance, he takes a title that cannot be impeached *aliunde*." This was substantially the view adopted by Manners, L. C. in *Lightburne v. Swift* (3). Amongst other cases mentioned by Sir Edward Sugden in *Bowen v. Evans* (4), are the decisions of the House of Lords in *Gore v. Stackpoole* (5); *Colclough v. Bolger* (6); *Colclough v. Sterum* (7) and *Bandon v. Beecher* (8). In each of these cases, relief was granted on the ground of fraud, and it was established that the purchaser, if not a party to the fraud, had notice thereof, actual or constructive; they will be found analysed by Sir Edward Sugden in his treatise of the law of property as administered by the House of Lords, 1849, Chap. VI section iii, pp. 679-720. In one of the cases, *Gore v. Stackpoole* (5) Lord Redesdale doubted whether even a purchase under the decree, without notice of the fraud, would be a protection, as he held it clear that a purchaser was bound to see that, at least so far as appeared on the face of the proceedings before the Court, there was no fraud in the case. Sir Edward Sugden hesitated to go as far as Lord Redesdale and observed in *Bowen v. Evans* (3): "That goes a great way, and I should act upon that opinion with very great precaution. If I found a purchaser buying, where fraud appeared clearly on the face of the decree, I should hold him to have notice of it; but I should have much hesitation in visiting a purchaser with the consequences of what might be deemed implied notice of a fraud, which was not discovered by the Court, or the officers of the Court, or the Counsel concerned in the cause, whose duty it is not to permit the Court to make a decree not warranted by the facts of the case"; see also

(1) (1813) 2 Ba. & Be. 387.

(2) (1806) 2 Sch. & Lef. 566.

(3) (1812) 2 Ba. & Be. 207.

(4) (1844) 1 J. & L. 178; (257).

(5) (1813) 1. Dow. 18; 14 R. R. 1.

(6) (1816) 4 Dow. 54; 16 R. R. 24.

(7) (1821) 3 Bligh 181; 22 R. R. 1.

(8) (1835) 9 Bligh (N. S.) 532; 3 Cl. & F. 479.

Lansdowne v. Beauman (1) where Hart L. C. referred to the observations of Lord Redesdale in *Gifford v. Hort* (2), and expressed the opinion "that the utmost caution should be used in touching sales under decrees, and that nothing could be more dangerous than for the Court to strain the effect of notice, for the purpose of unsettling the transaction of an honest purchaser under a decree." In this connection, reference may be made to the decision of the House of Lords in *Mullins v. Townsend* (3), as an illustration of a case where the irregularities in connection with the sale were so grave and manifest that the Court had no difficulty in condemning the transaction as fraudulent and in cancelling the sale which had been made at an under-value. The cases of *Lloyd v. Johns* (4) and *Curtis v. Price* (5), which are mentioned in *Bowen v. Evans* (6), furnish instances, not of fraud but of irregularity in the proceedings, and it was accordingly held, by Lord Eldon in the one case and by Sir William Grant M. R. in the other, that the purchaser should not lose the benefit of his purchase. The decision in *Townsend v. Warren* (7), which was heard in the first instance by Manners, L. C. and subsequently affirmed by the House of Lords, was based upon very special facts, as explained by Sir Edward Sugden in *Bowen v. Evans* (6) and also in his *Law of Property*, p. 712. The sale was allowed to stand, though a fraud had clearly been practised on the inheritance and the purchaser was a party thereto; the case, however, was treated by Lord Chancellor Manners, erroneously as it subsequently transpired, as one of irregularity, and relief was confined to the award of the full and fair value of the property at the time of the sale. On the other hand, in *Thornhill v. Glover* (8) Sir Edward Sugden in 1842 set aside a sale which had taken place in 1808, as it appeared that the machinery of the Court had been resorted to to effectuate a sale made, not by the order of the Court, but by a contract entered into behind the back of the Court; and though he deplored that the Court should be required to interfere after such a lapse of time, he added that he must not, in the words attributed by Lord Harcourt to Twisden, J. in *A. G. v. Sutton* (9), "steal leather to make poor men shoes." We may add that in *Beioley v. Carter* (10) Selwyn, L. J. quoted with approval the follow-

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- (1) (1828) 1 Molloy 89 (92). (2) (1804) 1 Sch. & Lef 386.
(3) (1831) 2 Dow & Cl. 430; 5 Bligh (N. S) 567.
(4) (1802) 9 Ves. 37. (5) (1805) 12 Ves 89; 8 R. R. 303.
(6) (1844) 1 J. & L. 178. (7) (1812) 1 J. & L. 221; 6 Ir. Eq. Rep. 620.
(8) (1848) 3 Dr. & War. 195. (9) (1721) 1 P. Wms. 754 (765).
(10) (1869) L. R. 4 Ch. App. 230 (239).

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ing passage from the judgment of Sir Edward Sugden in *Bowen v. Evans* (1) which sets out succinctly the reasons why a judgment and sale should not be permitted to be impeached to the detriment of an innocent purchaser :

"First, there is *Lloyd v. Johnes* (2) in which Lord Eldon held that the purchaser should not lose the benefit of his purchase by reason of an irregularity in the proceedings ; that case has been explained by Lord Redesdale in *Bennett v. Hamill* (3), and by Sir W Grant in *Curtis v. Price* (4). Lord Redesdale seems not to have entirely agreed with Lord Eldon, but, with great deference to the high authority with whom I am compelled to differ, I entirely subscribe to the doctrine of Lord Eldon. In *Curtis v. Price* (4), the Master of the Rolls, though not called on to decide the point, declared his opinion to be, that although accounts were not taken or inquiries directed which ought to have been taken and directed, yet that being the act of the Court it could not affect the purchaser ; and he was also of opinion that a direction by the Court to pay the purchase-money to a wrong person would not affect the purchaser. I entirely subscribe to that opinion. I think that though there may have been some advantage taken of the parties to the cause, it ought not of itself to constitute a ground for impeaching the sale ; for it would be extremely dangerous to impress upon the minds of purchasers under decrees that that which had escaped the vigilance of the Court, of its officers, and of the Bar, would form a sufficient ground to set aside a sale. I could not lay down a rule more mischievous to the suitors of the Court and the interests of the public, for it is of the greatest importance that sales made under the authority of the Court should not be lightly set aside."

Reference may also be made in this connection to *Gavin v. Hadden* (5). We may take it, then, that a judgment which has been obtained by fraud, either in the Court, or of one or more of the parties, can be impeached by means of an action, and can be set aside against those who procured it by fraud : *Toulmin v. Steere* (6); *Cammell v. Sewell* (7); *Coaks v. Boswell* (8); *Boswell v. Coaks* (9); *Schedden v. Patrick* (10). There is, however, at least one exception to

(1) (1844) 1 J & L. 178 (258).

(2) (1802) 9 Ves. 37.

(3) (1806) 2 Sch. & Lef. 566 (579).

(4) (1805) 12 Ves. 89.

(5) (1871) L. R. 3 P. C. 707.

(6) (1817) 3 Mer. 210; 17. R. R. 67.

(7) (1858) 3 H & N. 617; 117 R. R. 878.

(8) (1886) 11 App. Cas. 232.

(9) (1894) 6 R. 167 H. L.

(10) (1854) 1 Macqueen H. L. 535.

this rule ; for, as stated by Cozens-Hardy, L. J. in *Birch v. Birch* (1), although in most cases a judgment obtained by fraud can be set aside only as against the person who committed or procured the fraud, this limitation does not apply to an action to set aside a judgment granting probate of a will, inasmuch as a will must be either good or bad against all the world.

Reference has sometimes been made in the discussion of this question, as in *Chittambar v. Krishnappa* (2), to the class of cases which hold that a stranger who purchases in execution of a decree is not affected by the subsequent cancellation or reversal of the decree : *Chunder Kant v. Bissesur* (3) ; *Jan Ali v. Jan Ali* (4) ; *Zainul Abidin v. Muhammad Ashgar* (5) ; *Mukhoda v. Gopal* (6) ; *Indurjeet v. Pootee* (7) ; *Janakdhari v. Gossain Lal* (8) ; *Nagendra v. Parbati* (9). The principle which lies at the root of this class of cases was investigated in *Narendra Chandra v. Jogendra Narain* (10), and does not logically require extension to cases where a fraud has been committed on the Court itself. The rule that a stranger purchaser is not affected by the reversal of the decree for error or irregularity is based, as the cases show, on grounds of public policy, though it operates harshly upon the person whose property has been sold, and who it may turn out in the end was not liable at all to the plaintiff. It is at least questionable whether this rule should be made to comprehend within its scope the class of cases where fraud has been committed upon the Court, which, though established for the administration of justice, has been utilised by an unscrupulous litigant for the accomplishment of a dishonest purpose ; such an extended application of the rule would undoubtedly tend to encourage fraud.

The question under consideration has, as may be anticipated, frequently come under examination in the Courts of the United States, and the balance of judicial opinion there favours the view that a *bona fide* purchaser, for value without notice, at an execution sale, is not affected by infirmities in the judgment or proceedings subsequent thereto, which do not appear on the face of the record,

(1) (1902) P. 130.

(2) (1902) I. L. R. 26 Bom. 543.

(3) (1867) 7 W. R. 312.

(4) (1868) 1 B. L. R. 56 ; 10 W. R. 154.

(5) (1887) L. R. 15 I. A. 12 ; I. L. R. 10 All. 166.

(6) (1899) I. L. R. 26 Calc. 734 ; 3 C. W. N. 766.

(7) (1873) 19 W. R. 197.

(8) (1909) I. L. R. 37 Calc. 107 ; 11 C. L. J. 254.

(9) (1914) 20 C. W. N. 819.

(10) (1914) 20 C. L. J. 459.

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such as secret vices, frauds, defects or other infirmities ; see Freeman on Void Judicial Sales, section 41 ; Freeman on Judgments, section 509 ; Freeman on Executions, section 342 ; Kleber on Void Judicial and Execution Sales, section 369 ; Rorer on Judicial and Execution Sales, section, 570, 1101. The adoption of the rule has been often challenged, but has been defended on grounds which are best stated in the judgment of a Full Bench of the Supreme Court of California, in *Reese v. Kennedy* (1) where Crockett, J. observed as follows :

" No principle is better settled than that a purchaser at a judicial sale, without notice, under proceedings regular on their face, and had in a Court of competent jurisdiction, is not affected by any mere error of the Court, for which the judgment might be reversed on appeal, nor for any secret vice in the judgment, not appearing on the face of the record, and which can be made to appear only by the production of extrinsic evidence. He is bound at his peril to inquire whether it sufficiently appears on the face of the record that the Court had jurisdiction to render the judgment, and whether there is a valid execution. But nothing more is required of him. Unless the plaintiff in the action be also the purchaser at the sale, the latter will not be affected by any mere error of the Court, even though the judgment be afterwards reversed for such error ; nor can his rights be impaired by any secret vice in the proceedings, resulting from fraud or other similar cause, of which he had no notice. As between the parties to the action, a judgment fraudulently obtained will be set aside and held for naught when the fraud is made to appear. But there would be no security in titles acquired at judicial sales if the rights of a *bona fide* purchaser, without notice, could be overthrown by subsequent proof that the judgment was obtained by fraud, or that the record, which showed a due service on the defendant, was in fact false. The repose of titles, and indeed every consideration of public policy, demands that a purchaser at a judicial sale, without notice, under proceedings regular on their face, and by a Court of competent jurisdiction, should be protected as against mere errors of the Court, and against secret vices in the proceedings founded on fraud, accident, or mistake, and which can only be made to appear by the proof of extrinsic facts not appearing on the face of the record. No prudent person would purchase at a judicial sale, if he incurred the hazard of losing his money, in case it afterwards should be made to appear that the judgment was obtained by perjury or other frau-

(1) (1872) 43 Cal. 643.

dulent practices, or that the record on which he relied, as proving a service on the defendant, was in fact false. These propositions are too familiar to require the citation of authorities in their support, and we have been referred to none which appear to contravene them, unless it be two cases decided by the Supreme Court of Iowa: *Hansby v. Blackman* (1); *Bryant v. Williams* (2). The principle settled in those cases is, that a defendant in an action, who was not a resident of the State, and was not served with process by publication or otherwise, and for whom an attorney without authority had entered an appearance, might afterwards, on proof of these facts, recover the property sold under the judgment from a *bona fide* purchaser, without notice. It is unnecessary, for the purposes of this case, to examine the reasoning on which these decisions are founded. But if the peculiar facts of those cases should take them out of the general rule to which I have adverted, it would only prove that the rule, in its broadest sense, is not wholly without an exception, and would not impugn the rule itself. If an unauthorized appearance by an attorney, for a non-resident defendant, who was not served with process, can be afterwards shown to invalidate the title of a *bona fide* purchaser without notice at the execution sale, it stands, so far as I am aware, as a solitary exception to the general rule, and the doctrine ought not to be further extended."

This was followed by the Supreme Court of Virginia in *Marrow v. Brinkley* (3), and when an attempt was made to question that decision before the Supreme Court of the United States, the application for leave to appeal was rejected: *Marrow v. Brinkley* (4). The question was again elaborately discussed by the Supreme Court of North Carolina in *Millsaps v. Estes* (5) and in *Yarborough v. Moore* (6), and the rule was re-affirmed that innocent purchasers at a judicial sale, who had no notice of any irregularity in the proceedings and the judgment under which the sale was made, would be protected in their purchase, where the Court had jurisdiction of the parties and subject-matter of the proceedings, and the judgment on its face authorised a sale. The rule has been enunciated in similar terms and recognised or applied without question, in New York in *Clarke v. Davenport* (7), in Alabama in *Dunklin v. Wil-*

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(1) (1865) 20 Iowa 128.

(2) (1866) 21 Iowa 329.

(3) (1888) 85 Va. 55; 6 S. E. 605.

(4) (1889) 129 U. S. 178.

(5) (1904) 137 N. C. 585; 70 L. R. A. 170; 107 Am. St. Rep. 496; 50 S. E. 227.

(6) (1909) 151 N. C. 116; 61 S. E. 763.

(7) (1857) 14 N. Y. Sup. Ct. 95.

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son (1), in New Jersey in *Wilson v. Hoffman* (2), in Maryland in *Spindler v. Atkinson* (3), in Arkansas in *Carden v. Lane* (4), and in Missouri in *Hellenan v. Ragsdale* (5). The Courts in the United States have, however, struggled to avoid the manifest hardship, if not injustice, of the application of the rule by the adoption of two principles: (i) they have drawn a distinction between judgments which are void and voidable, and they have ruled that if the judgment is void, even a *bona fide* purchaser does not acquire an unimpeachable title: *Rankin v. Schofield* (6); *McDonald v. Rankin* (7); *Taylor v. Savage* (8); *Mitchell v. Maxent* (9); *Lamaster v. Kee-lero* (10); (ii) they have held that a person is not a *bona fide* purchaser, unless he purchases without notice, actual or constructive, of the title or equity claimed to be superior to his rights as purchaser, and knowledge sufficient to put a reasonably prudent man on enquiry is constructive notice; in other words, though an execution purchaser need not be in a mood to scent fraud, he need not have complete information of every fact material for him to know; he is bound to make enquiry when there is anything that would excite the suspicion of a prudent man and place him on his guard: *Barnes v. McClinton* (11); *Gibson v. Winslow* (12); *Tarr v. Sims* (13); *Lang Syne Gold Min. Co. v. Ross* (14); *Fettis v. Johnston* (15). In this way, by a judicious application of the doctrine of constructive notice, the Courts of the United States have sought to avoid the harsh results which sometimes follow from the application of the stringent rule that the title of a purchaser in good faith and for value at a judicial sale should be considered invulnerable against an assault, wherein it is attempted to be shown that the judgment was procured by fraudulent machinations and misrepresentations of others, provided he is neither chargeable with notice thereof nor guilty of participation therein.

(1) (1879) 64 Alabama 162.

(2) (1801) 50 Atl 592.

(3) (1852) 3 Maryland 409; 56 Am. Dec. 755.

(4) (1885) 48 Ark. 216; 2 S. W. 709; 3 Am. St. Rep. 228.

(5) (1906) 199 Mo. 375; 97 S. W. 890.

(6) (1906) 81 Ark. 440; 98 S. W. 674.

(7) (1909) 92 Ark. 173; 122 S. W. 88.

(8) (1813) 1 Howard 282.

(9) (1866) 4 Wallace 237.

(10) (1887) 123 U. S. 376.

(11) (1831) 3 Pen & W. 67; 23 Am. Dec. 62.

(12) (1863) 46 Pa. St. 380; 84 Am. Dec. 552.

(13) (1832) Richardson Eq. Cas. (S. C.) 122; 24 Am. Dec. 356.

(14) (1888) 20 Nev. 127; 18 Pac. 358; 19 Am. St. Rep. 337.

(15) (1920) 190 Pac. 681.

We are thus brought back to the rule enunciated by Sir Barnes Peacock in *Abdool Hye v. Nawab Raj* (1), namely, that in cases of this character, where a stranger has purchased, the Court should determine, whether it will be in accordance with the principles of justice, equity and good conscience to set aside the sale. The Court has, in fact, to reconcile two conflicting principles. On the one hand, as De Grey, C. J. said in *R. v. Duchess of Kingston* (2), fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of justice, and, in the words of Lord Coke, avoids all judicial acts, ecclesiastical and temporal. James, L. J. emphasised the same idea when he stated in *Vane v. Vane* (3) that a Court of equity will wrest property, fraudulently acquired, not only from the perpetrator of the fraud, but, to use Lord Cottenham's language in *Trevelyan v. Charter* (4), affirmed by the House of Lords in *Charter v. Trevelyan* (5), from his children and his children's children, or, as was said in *Huguenin v. Baseley* (6) and *Bridgeman v. Green* (7) from any persons amongst whom he may have parcelled out the fruits of his fraud, and will restore it to those from whom it has been fraudulently abstracted. On the other hand, as Lord Loughborough said in *Jerrard v. Saunders* (8), against a purchaser for valuable consideration without notice, the Court will not take the least step imaginable, which is only a restatement of the pronouncement of Lord Northington in *Stanhope v. Earl Verney* (9); that a purchase without notice for a valuable consideration is a bar to the jurisdiction of the Court; see also similar expressions, perhaps more cautiously phrased, by Lord Loughborough in *Strode v. Blackburne* (10), by Lord Eldon in *Wallwyn v. Lee* (11), and by Lord Romilly in *A. G. v. Wilkins* (12). On the facts of each case, the Court has to determine, which of these doctrines should prevail. In the solution of the problem, we have to bear in mind that the protection given to the *bona fide* purchaser had its origin exclusively in equity and is based entirely upon the conception

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(1) (1868) 9 W. R. 196; B. L. R. F. B. 911.

(2) (1776) 20 How. St. Tr. 544; 2 Sm. L. C. 754.

(3) (1873) L. R. 8 Ch. App. 383 (397).

(4) (1835) 4 L. J. Ch. 209 (214).

(5) (1844) 11 Cl. & F. 714; 65 R. R. 305.

(6) (1808) 14 Ves. 273; 9 R. R. 148 (276, 281).

(7) (1757) Wilmot 58; 2 Ves. Sen. 627.

(8) (1794) 2 Ves. 454 (458).

(9) (1761) 2 Eden 81 (85).

(10) (1796) 3 Ves. 221.

(11) (1803) 9 Ves. 24 (34); 7 R. R. 142.

(12) (1853) 17 Beav. 285 (291); 9 R. R. 149.

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that a Court of equity acts solely upon the conscience of litigant parties, by compelling the defendant to do what, and only what, *in foro conscientie* he is bound to do. If the relations between the two contestants standing before the Court are such that, in equity and good conscience, the plaintiff ought to obtain the aid which he asks, and the defendant ought to do or suffer what is demanded of him, then the Court will interfere and grant the relief; if the relations are not of this character, then the Court will withhold its hand and will leave the parties where they stand. The protection given to the *bona fide* purchaser, therefore, simply means that from the relations subsisting between the two parties, specially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so; that Court will not, in such an event, aid either party against the other. The doctrine of *bona fide* purchase is thus not a rule of property. It does not determine the question of title between parties. It is in most cases available only by way of defence. It is a shield in the hands of a defendant, to protect him against the claim of his adversary. It means that equity will refuse to interfere to aid the plaintiff in his suit, because, under the circumstances of the case, it would be unconscionable that the plaintiff should have what he seeks to obtain. It enforces no right, but simply refuses to interfere in the plaintiff's behalf. We are not concerned here with the very exceptional cases where a *bona fide* purchaser is aided by affirmative relief, by reason of the fraud of the party holding the prior title or interest; these need not be exhaustively enumerated and classified for our present purpose, but examples are furnished by the decisions in *Savage v. Foster* (1); *Ibbottson v. Rhodes* (2); *West v. Jones* (3); *Dillon v. Costelloe* (4); *Hickson v. Aylward* (5); *Wallade v. Lord Donegal* (6). But, apart from such special instances, the doctrine is applied for the protection of the defendant in cases which have been grouped by Lord Westbury into three classes in *Phillips v. Phillips* (7): (i) where an application is made to the auxiliary jurisdiction of the Court by the possessor of a legal title; (ii) where the plaintiff, holding an equitable estate or interest, seeks to enforce it against a purchaser of the legal title;

(1) (1723) 9 Mod. 35.

(2) (1706) 2 Vernon 554.

(3) (1851) 1 Sim. N. S. 205; 89 R. R. 67.

(4) (1827) 2 Molloy 512.

(5) (1828) 3 Molloy 1.

(6) (1837) 1 Dr. & War. 461.

(7) (1869) 4 DeG. F. & J. 208; 135 R. R. 97.

and (iii) where the plaintiff seeks to enforce some equity, as distinguished from an equitable estate, as the reformation of a deed on account of mistake or its cancellation on the ground of fraud. In each case, it must be remembered that the doctrine is confined to Courts of equity and is in no sense a rule of property but is a rule of inaction. In such circumstances, the most convenient course to follow is obviously to enunciate the rule in an elastic form, adaptable to varied combinations of circumstances, as was done by Sir Barnes Peacock in *Abdool Hye v. Nawab Raj* (1). In the application of that rule to a concrete case, we may usefully bear in mind that a *bona fide* purchaser for value without notice has always been a favourite with Courts of equity. But to crystallize the rule further, would only be to impair its utility. Thus alone can we give effect to the elementary truth that the law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society, though the progress of the law must be by analogy to what is already settled.

Tested in the light of these principles, how does the case for the defendant stand? We have seen that in 1904, the landlords sued the present plaintiffs to recover Rs. 2-2-0 as arrears of rent. It has not been investigated whether the claim was real or illusory. This much is known that the processes were suppressed, false returns were submitted to the Court, and an *ex parte* decree was obtained. The decree was not executed for three years. Processes were again suppressed, false returns submitted and the sale held on the 21st November 1907, when Beharilal Das became the purchaser for an insignificant sum. The judgment-debtors were not present; there were no bidders; there was no competition. Any purchaser, however optimistic, could, in such circumstances, have inferred that there must have been something wrong with the proceedings. Das, after his purchase, never obtained delivery of possession and never paid rent to the landlords; the original tenants were accordingly left in undisturbed occupation, as before. The landlords next sued the widow of Das—this time for the recovery of Rs. 15-7-6—and obtained an *ex parte* decree on the 24th June, 1913, as processes were suppressed and false returns submitted to the Court. The sale was not held, till after the lapse of more than three years, on the 21st November, 1916, when the appellant Biseswar Ghose became the purchaser for a small sum. The processes in execution had not been served; there were no bidders; there was no competition. If the intending purchaser had made any enquiry,

(1) (1868) 9 W. R. 196; B. L. R. F. B. 911.

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he would have found that, not the judgment-debtor, the widow of Das, but the original tenants were in occupation. This would have put a reasonable man on his guard : *Barnhart v. Greenshields* (1) ; *Mancharji v. Kongseoo* (2) ; *Hakeem v. Beejoy* (3) ; *Radha Madhab v. Kalpataru* (4). The fact remains that the appellant was able to secure the property for an insignificant sum. We cannot hold, in these circumstances, that the *bona fides* of the first or of the second purchaser were as unquestionable as their good fortune in acquiring a property at a fraction of its value without contest or competition. In our opinion, it would be a well-merited reproach to the administration of justice if we were compelled to uphold execution purchases of this description, by the application, without discrimination, of the formula of *bona fide* purchase for value without notice.

We feel no doubt that the Subordinate Judge has rightly set aside the sale, and decreed the suit ; his decree must consequently be affirmed and this appeal dismissed with costs.

Rankin J : I agree in the view that this appeal should be dismissed with costs. The circumstances of the case as found by the lower appellate Court indeed the mere dates of the decrees and executions coupled with the fact that Behari Das was never in possession convince me that the defence of " purchaser for value without notice " has no basis in the facts. There is simply no room for it. There is an express finding that he was not a *bona fide* purchaser : and in the circumstances detailed by the learned Subordinate Judge any other finding would have been inexplicable. Neither by his pleading nor by the way in which issues were taken at the trial, or points advanced on first appeal has the purchaser done anything to entitle him to complain that the judgment of the Court below is an insufficient analysis of the facts as to this part of the case. It may be taken that there was some room for controversy upon the facts as the Courts below were not in agreement. But I see no error of law ; and on the facts stated by the learned Subordinate Judge I see no escape from his conclusion. The judgment of Jenkins, C. J., in Bombay case *Chitambar v. Krishnappa* (5) decides merely that inadequacy of price, in the absence of notice of the fraud or defect in the proceedings, does not give rise to a right to have the sale set aside. It in no way throws doubt upon the proposition that judicial sales fraudulently procured will not give a good title to a purchaser who does not take in good faith and with-

(1) (1853) 9 Moo. P. C. 18.

(2) (1869) 6 Bom. H. C. R. 59.

(3) (1874) 22 W. R. 8.

(4) (1912) 17 C. L. J. 209.

(5) (1902) 1. L. R. 26 Bom. 543.

out notice. The fact that the Court has been successfully deceived is one which, upon the issue as to the purchaser's good faith, must be of very different value in different circumstances. In the present case this consideration goes but a little way. In other cases it may go almost all the way. But in all cases the burden of proving that he acted in good faith and without notice of the fraud is in the first instance upon the purchaser. This in my opinion is an essential feature of the equitable rule. The rule is not that there is a special favour for every one until he is shown to have been dishonest or a volunteer, but that equity where it can will favour those who show that in innocence they have given value [Cf. *In re Nisbit & Pott's Contract* (1).]

A. T. M.

Appeal dismissed.

(1) (1905) 1 Ch. 321.

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CRIMINAL REVISION.

Before Mr. Justice Neubould, and Mr. Justice Suhrawardy.

SARAT CHANDRA GHOSH AND OTHERS

v.

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November, 28.

Punishment, separate—Criminal Procedure Code (Act V of 1898), Sec. 35—Distinct offences—Offences under sections 147 and 225 I. P. C. (Act XLV of 1860).

Under section 35 of the Code of Criminal Procedure, a person convicted of offences under sections 147 and 225 of the Indian Penal Code, is not liable to separate punishment for each offence, as the two offences are not distinct: *Bhup Singh v. Emperor* (1) and *Alim v. Shahasada* (2) referred to.

Application under section 435 of the Code of Criminal Procedure by the Accused.

Rabus Manmatha Nath Mukherjee and Jatis Chandra Guha for the Petitioners.

* Criminal Revision No. 925 of 1912 against an order of the Additional District Magistrate of Midnapur, dated the 10th October, 1922.

(1) (1903) 8 C. W. N. 305.

(2) (1901) 8 C. W. N. 483.

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The judgment of the Court was as follows :

This Rule was granted only on the ground that the separate sentences passed on the petitioners were illegal. They were convicted of offences punishable under sections 147 and 225 I. P. C. and sentenced to three months rigorous imprisonment on each count, the sentences to run consecutively. In the charge of rioting punishable under section 147 I. P. C. the common object of the unlawful assembly is set out "to resist the execution of law by forcibly rescuing a prisoner (accused), Lalu Kabiraj, from the lawful custody of two constables Harun Rashid and Srimanta Bera." In the second charge of an offence punishable under section 225 I. P. C. the words used to describe the offence are "intentionally rescued or attempted to rescue a prisoner, Lalu Kabiraj from the lawful custody of constables Harun Rashid and Srimanta Bera." It might be argued that rioters being members of an unlawful assembly with the common object of committing an offence and the actual commission of that offence are separate and distinct offences. But even accepting this contention we must hold having regard to the provisions of section 71 of the Indian Penal Code and section 35 of the Code of Criminal Procedure that a person convicted of such offences would not be liable to separate punishment for each offence. This follows from the illustration to section 35 Cr. P. C. When the offences of committing house breaking with intent to commit theft and the actual commission of theft are declared by law not to be distinct offences within the meaning of section 35 Cr. P. C. it follows that the two offences of which the petitioners have been convicted are not distinct offences for which separate sentences can be passed. This view is supported by the authority of the decisions in the cases, *Bhup Singh v. Emperor* (1), and *Alim Sheikh v. Shahazada Singh Burkundaz* (2).

We accordingly make this Rule absolute and direct that the sentences of three months rigorous imprisonment passed on the petitioners under sections 147 and 225 I. P. C. will run concurrently and not consecutively.

A. T. M.

Rule made absolute.

(1) (1903) 8 C. W. N. 305. (2) (1904) 8 C. W. N. 483.

CRIMINAL REFERENCE.

Before Mr. Justice Walmsley and Mr. Justice Pearson.

EMPEROR

v.

SATYENDRA KUMAR DUTT CHOWDHURY.*

Witness—Evidence Act (I of 1872), Sec. 154—Hostile witness—Telling different story—Evidence of hostile witness, if can be believed in part—Court witness—Criminal Procedure Code (Act V of 1898), Sec. 540.

The mere fact that at a sessions trial a witness for the prosecution tells a different story from that recorded by the Sub-Inspector after the occurrence, does not necessarily make him hostile : *Kalachand v. Queen Empress* (1) and another case.

When a witness is cross-examined by the party calling him, his evidence cannot be believed in part and disbelieved in part but is to be rejected *in toto* : *Faulkner v. Brine* (2).

The provisions of section 540 of the Code of Criminal Procedure are very wide. The judge may summon witnesses to the box, and if the public prosecutor declines to examine them, may thereupon acting on his own initiative cause them to be produced. Such witnesses may thereupon be regarded as called under that section.

Reference under section 307 of the Code of Criminal Procedure.

The accused was put on his trial on a charge of murder. The jury was unanimous in finding him not guilty of murder, and by a majority of four to one, it found him not guilty of the offence of culpable homicide. The Sessions Judge disagreeing with the verdict made a reference to the High Court.

Babus Dasarathi Sanyal, Manmatha Nath Mukherjee, Hemendra Kumar Das, Birendra Chandra Das and Priya Nath Dutt for the Accused.

Mr. Orr (Deputy Legal Remembrancer) for the Crown.

The following order was passed by the Court :

Walmsley J.—The accused Satyendra Kumar Dutt Chowdhury was placed on his trial upon a charge of murder. The jury was unanimous in finding him not guilty of murder, and by a majority of four to one it found him not guilty of the lesser offence of culpable homicide. The learned Judge felt himself unable to accept this verdict, and consequently made a reference to this Court under the provisions of section 307 Cr. P. Code.

* Jury Reference No. 65 of 1922. made by B. N. Rau Esq. Sessions Judge of Sylhet, dated the 24th July, 1922.

(1) (1886) I. L. R. 13 Calc. 53.

(2) (1858) 1 F. & F. 254.

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The case has some remarkable features, not only in the bold facts of the occurrence as told by the prosecution but also in the conduct of the proceedings in the Court of Sessions.

The accused belongs to the village of Richi and he and his co-sharers are zemindars of the village. The zemindars are divided into two hostile groups, Nagendra, Ramesh and Dwijendra forming one group, and the accused and Khired the other group. These two groups are frequently quarrelling, but they share the same *bari*. Immediately adjoining this *bari* is a *bari* occupied by Amar Kinkar Bhattacharjee and his brothers Prokash and Hara Kinkar.

Natabar Tarsa, the deceased used to be employed as a servant by Satyendra the accused, but on account of some difference he left his service and entered the service of Amar Kinkar and Prokash about six months before the occurrence.

The relations between the Bhattacharjees and the Duttas seem to have varied : Amar Kinkar says that he and Prokash have always been on friendly terms with Satyendra, in fact Amar Kinkar acted as his priest and his pleader until just before the occurrence. Hara Kinkar on the other hand has been employed at different times by both Nagendra and Satyendra, but Satyendra is said to have regarded him as a declared enemy.

On the day of occurrence the Bhattacharjee brothers were celebrating their mother's Sradh, and Satyendra wanted Amar Kinkar to keep up the old feud between himself (Amar Kinkar) and Hara Kinkar, and it is said that he tried to enforce his wishes by refusing to lend utensils for the ceremony, and by causing notice of execution proceedings, in regard to a decree obtained by his aunt against Amar Kinkar and Prokash, to be served when the courtyard was crowded with guests. These measures were useless and Amar Kinkar and Hara Kinkar did for a time at any rate patch up their quarrel. It does not seem to be suggested that Satyendra bore Amar Kinkar any grudge for taking Natabar into his service but it is said that relations between Natabar and Satyendra continued to be strained.

To return to the occurrence : by the afternoon the hosts were entertaining their humbler guests, and there were sitting in the courtyards two lines, of Naths and Dhobis : and at the north end of the line that ran N. S. was Natabar the deceased : all were partaking of *chira* and *duhi* when suddenly the accused entered the courtyard and thrust a spear into Natabar's left side with such force as almost to transfix him. The accused then disappeared, and no one tried to stay him.

Amar Kinkar shortly afterwards went to the thana, three miles away : he told his story about 4-30 P. M. and it was recorded by the senior Sub-Inspector Satish Chandra Maitra who sent the junior officer Purna Chandra Dutta to investigate. Purna Chandra found a considerable number of people present, and the first thing he did was to record the dying declaration of Natabar, and a few minutes after he had finished Natabar died. Before dawn he left the village with the dead body, and then examined some witnesses at the thana on the morning of the 24th. After that he was engaged on other work and nothing more was done until the 29th when the senior Sub-Inspector went to the place accompanied by two superior officers. The accused was not found by either Sub-Inspector, and it was not until April 26 that he gave himself up to the Magistrate.

As to the time, place and cause of death, I do not think there can be any doubt. Amar Kinkar's evidence as to the time is preferable to that of another witness who is probably less familiar with time as measured by the clock. As to place, questions have been asked about the presence of blood stains but none of them amount to a suggestion even that the deed took place somewhere else. The cause of death is fully described by the doctor who made the post mortem, and it is worth mentioning that he found undigested *chira* and *dahi* in the stomach.

The all important question is whether it is proved that it was the accused who dealt the blow, closely connected is the subsidiary question of why a man of ordinary intelligence should have chosen such an occasion, time and place for the crime.

It is this second point which has caused so much trouble in the case. The police appear to have submitted the case as one in which the accused attacked Natabar without any quarrel immediately preceding the incident, that is to say, with nothing more fresh than a quarrel at the tank on the previous day. In the Magistrate's Court, however, several witnesses gave quite a different version instead of a stealthy entrance to deal a premeditated blow, they described a violent quarrel in which Natabar used filthy language, and threatened Satyendra with a piece of wood, and Satyendra happening to find a spear, flung it at Natabar. In consequence of this variation, before the Court of Sessions, the public prosecutor obtained permission to cross-examine one of the prosecution witnesses as hostile, while others were called as Court witnesses and tendered to both sides for cross-examination. The witness who was declared hostile is Padma Lochan (P. W. 3), while the witnesses called as Court witnesses and cross-examined, or offered for cross-examination

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by both sides were Rameshwar Dhupi, Mukunda Nath, Bipin Namasut, Mathur Chandra De, Girija Mohun Deb, and Satish Maitra, the senior Sub-Inspector, I have omitted Amar Kinkar's name because his case stands on a different footing.

It is urged on behalf of the accused that in the circumstances stated the whole of the evidence given by these witnesses must be rejected.

Padma Lochan is the only witness who was cross-examined by the public prosecutor under the provisions of section 154 of the Evidence Act. The learned Judge gave two reasons for granting permission, namely, that the witness was a tenant of Khirod, cousin of the accused, and that his statement differed from the statement recorded by the Sub-Inspector shortly after the occurrence, and he expressed the hope that cross-examination would "help the Court to assess the exact value of different parts of the witness' testimony." The learned Judge's charge proceeds on the same footing, and the argument for the accused is that the Judge was wrong in thinking that the evidence as to identity might be accepted and the evidence as to a quarrel be rejected.

It appears to me that the learned Judge was wrong in allowing the public prosecutor's request. The first reason which he gives has no force at all, and the second has been held to be inadequate in the cases of *Kalachand Sircar v. Queen Empress* (1); *Surendra Krishna Mandal v. Srimati Ranee Dassi* (2). The fact remains however that the witness was cross-examined by the prosecution and the question is whether the whole of his evidence must be rejected, or the Court can believe it in part and disbelieve it in part. In the case of *Faulkner v. Brine* (3) defendant's counsel asked for permission to question his own witness as to the statement which he had made to defendant's attorney because it was much more favourable to the defendant than the version given in Court and Lord Campbell C. J. in allowing the question to be put said: "It must be understood that it must be done to discredit the witness altogether, and not merely to get rid of part of his testimony. If that which is suggested shall be elicited it will show that he is not trustworthy at all." See also the case of *Surendra Krishna Mandal* (2) above quoted at page 869. That is the principle to be applied to the evidence of a witness who has been examined by the party which called him. The result is that Padma Lochan's evidence

(1) (1886) L. L. R. 13 Calc. 53.

(2) (1920) 24 C. W. N. 860 (869)

(3) (1858) 1 F & F, 254.

must be excluded altogether. Then there are the so-called Court witnesses. I say "so-called" because I do not think that they are really Court witnesses. The provisions of section 540 Cr. P. Code are very wide, and the learned Judge might have summoned these witnesses to the box, and if the position were that the public prosecutor declined to examine the witnesses and the Judge thereupon acting on his own initiative caused them to be produced. I should regard them as called under that section. But the order recorded on June 26, which covers all the witnesses except the Sub-Inspector, shows that the position was quite different. "The Public Prosecutor puts in a petition requesting the Court to examine witness Rameshwar as a Court witness, so that both parties may cross-examine him." The reason for the request appears to have been just the same as in the case of Padma Lochan, that these witnesses had not mentioned any quarrel to the Sub-Inspector. The public prosecutor was therefore seeking to treat them in the same way as Padma Lochan without any preliminary questioning. That being so, I think their evidence should share the same fate as Padma Lochan's. The case of the Sub-Inspector was dealt within a separate order dated July 13. The public prosecutor urged that he was trying to shield the accused and was not worthy of confidence: the pleader for the accused made an objection to the proposal, but his suggestion that as a Court witness, the Sub-Inspector should be cross-examined only by the accused was not helpful. I think that in view of the order passed by the Judge the evidence of the Sub-Inspector Satish must also be shut out.

The remaining evidence as to the identity of the assailant is to be found in the dying declaration recorded by Sub-Inspector Purana, and in the depositions of Amar Kinkar and Mahendra.

The dying declaration was discussed before us at considerable length, with reference to the language in which it is couched, the capacity of the dying man to make such a statement, the possibility that the answers were prompted and so forth. As for the language it is difficult to know what to expect when an Assamese officer records an Uriya coolie's statement in Bengali. The medical evidence is indefinite and cannot override positive evidence that Natabar did make a statement. Hara Kinkar did undoubtedly help the Sub-Inspector but he is blind, and I cannot accept that contemptible witness, Uma Charan, as sufficient to show that it was Hara Kinkar and not Natabar who gave the name Satya Babu. The really important point about the declaration, however, is independent of these criticisms. Uma Charan says that the state-

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ment was recorded in the presence of 25 or 30 persons, that on completion it was read out to them before they dispersed. Not a question was asked to suggest that any one protested. It seems incredible that, if as a fact Natabar made no statement, or mentioned no name, or mentioned a name that was not Satya, such gross dishonesty could have passed unchallenged. I accept it therefore as proved that Natabar did tell the Sub-Inspector that the accused was his assailant.

With regard to the evidence of Amar Kinkar it is urged that it should be excluded altogether, on the same principle as Padma Lochan's. The position however is quite different. Amar Kinkar went to the Thana and gave an extremely succinct account of what had happened. In the Magistrate's Court his statement about the actual occurrence was very brief. On neither occasion did he say that he actually saw the blow being struck. In fact before the Magistrate he clearly suggested that what he first saw was Satya holding one end of the spear and Padma the other. The police and the public prosecutor however assumed that Amar Kinkar had seen every thing in spite of the suggestion just mentioned and in spite of the distinction which the witness drew in examination-in-chief between sight and inference. When the defence afterwards elicited that the witness had not seen accused give the spear thrust but had inferred from circumstances that it was the accused who must have done so, the public prosecutor jumped to the conclusion that the witness was trying to aid the accused and after a few questions in re-examination he sought and obtained permission to cross-examine the witness. This was an egregious blunder. The question is what result follows. One possible way of looking at the matter is to say that the examination of the witness was complete when this cross-examination began, and therefore the outcome of the public prosecutor's cross-examination should be expunged. Another way, and a more satisfactory one, is to say that this cross-examination did not shake the credit of the witness, and that as all the facts are before us we are in quite as good a position as the Public Prosecutor to decide whether the apparent divergence in the statements shows carelessness of the truth. If either at the Thana or in the Magistrate's Court Amar Kinkar had used language which could only mean that he had seen with his eyes certain things take place, and had afterwards said that he had only drawn inferences from things, then I should think that he was shuffling and not reliable, but that is not the case as I have shown. His case is very different therefore from Padma Lochan's, different too

from the circumstances in *Faulkner v. Brine* (1). My conclusion is that the principle laid down in the last mentioned authority has no application here; and that we may accept Amar Kinkar's evidence for what it is worth. As to its value, I regard it as the evidence of a man who is doing his best to give a faithful account of what happened in distressing circumstances. The inauspicious ending to the ceremony, and the duty of denouncing his next door neighbour cast upon him a burden which was very irksome: he went to the thana at once, but after that left the police to work without his help, and did nothing but answer the questions put to him.

The remaining witness is Mahendra: his account confirms Amar Kinkar's story. The main objection to his evidence is this: In examination-in-chief he said that he saw accused spear Natabar and that he raised an outcry. In cross-examination he said, apparently without any evasion that he was in the *kachari* house, that the western door on to the courtyard was shut, and therefore the place where Natabar was eating was not visible. A little later he said that when he shouted he shouted loud enough for the others in the house to hear him. If the last sentence did not imply that he had gone out, I should at any rate have expected the defence pleader to try and ascertain what the witness meant by saying first that he had seen something happen and then that he was in a position where he could not see. Instead of doing so, he left the explanation to be obtained in re-examination and deprived himself of the right to probe into the explanation. It is said now that the explanation is absurd, but I do not understand why. Unwise tactics have left it unchallenged and I think we should accept it. My conclusion is that Mahendra's evidence may be regarded as reliable. In addition to criticisms upon the whole evidence of the witnesses severally, the learned vakil has urged that there are discrepancies in small details, such as whether Natabar was standing or sitting, facing north or facing south when he was struck, who it was that pulled out the spear and so forth. It does not appear to me that such discrepancies are of any moment in the circumstances. Further, the ownership of the spear has been discussed, and it is asked how it could have come to be in the hands of the accused. The evidence available does not disclose an answer. But to this argument as to the argument based on the wild improbability of the story, the same reply may be given that the undoubted facts are that some one chose that time and place to spear the deceased.

(1) (1858) 1 F & F 254.

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In addition to the direct evidence or in corroboration of it, we may take into consideration the fact that if Satya's name has been falsely substituted for another name, such substitution must have been made to the knowledge of perhaps three hundred people without a protest from any one. My conclusion is that the evidence of Amar Kinkar and Mahendra, supplemented by the naming of the accused by the deceased, do prove beyond reasonable doubt that it was the accused Satyendra who speared Natabar.

On the evidence given by Amar Kinkar and Mahendra the offence must have been murder and nothing less : but neither of them saw anything until the last moment and I think the accused ought to have the benefit of what is said by the other witnesses about a quarrel and provocation. That is the view apparently taken by the dissentient juror, and although it may be straining the evidence, I think we should hold that the case falls within the first exception to section 300 I. P. C., and accordingly I find the accused guilty under section 304 I. P. C. and sentence him to transportation for life.

Before parting with the case I should like to add that although I think the conduct of the case in the Sessions Court does credit to nobody, I quite recognise that the circumstances were very difficult.

Pearson J.: I agree.

A. T. M.

Reference answered : Accused convicted.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Mr. Justice Panton.

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PARUL BALA DEBI

v.

SATISH CHANDRA BHATTACHARJEE.*

Maintenance—Criminal Procedure Code (Act V of 1898), Sec. 488—Temporary stay—Agreement—Arrears of maintenance—Intention.

A mere temporary stay of wife with her husband for a few months, though

* Criminal Reference No. 38 of 1922, made by the Sessions Judge of Burdwan.

may suspend the order for maintenance under section 488 of the Code of Criminal Procedure, has not the effect of cancelling it.

After the order for maintenance was passed, both parties put in a petition in which they agreed that the husband should pay his wife Rs. 10 a month as long as she remained at the house of her father. The petition ended thus : " We beg to ask the Hon'ble Court to pass a decree according to the above-mentioned term for Rs. 10 a month for maintenance":

Held, that the intention of the parties was, when they filed their petition, that the lady should abandon her claim to any arrears of maintenance which might have accrued due up to that date.

Reference under section 438 of the Code of Criminal Procedure.

An order was made under section 490 of the Code of Criminal Procedure for the levy of arrears of maintenance.

The material facts appear from the order of the Court.

Babus Dasarathi Sanyal, Manmatha Nath Mukherjee and Panna Lal Chatterjee for the Complainant.

Babus Amarendra Nath Bose and Lalit Mohan Sanyal for the Defendant.

The opinion of the Court was delivered by

Panton J. :—This is a Reference under section 438 of the Code of Criminal Procedure made by the Sessions Judge of Burdwan. It relates to proceedings under section 488 of the Code of Criminal Procedure instituted by one Parul Bala Debi against her husband, Satish Chandra Bhattacharjee. It appears that there were some proceedings of this nature which were infructuous and were struck off by the Sub-Divisional Magistrate on the 2nd April 1915; but the lady after that made another application on the 8th July 1915 which resulted in the Sub-Divisional Magistrate's making, on the 14th September 1915, an order in her favour directing the husband to pay her maintenance at the rate of Rs. 10 per month. The husband, it appears, is employed by the East Indian Railway Company. He was, at the time when the proceedings were instituted, in receipt of a monthly salary of Rs. 45 which has now risen to Rs. 76 a month. The lady was at the time residing elsewhere, but towards the end of the year 1918, she returned to her husband and lived with him for a few months. While she was staying with him, a petition was filed in the Court of the Magistrate on the 24th January 1918 in which the lady purports to relinquish her claim for maintenance. The order made upon this petition by the Magistrate was that it should be filed with the record. It further appears that the lady left her husband soon after this, and on the 24th March

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1919, she made a further application to the Magistrate for the payment of arrears of maintenance for one year. On the 12th April 1919, both parties put in a petition in which they agreed that the present petitioner should pay his wife Rs. 10 a month as long as she remained at the house of the petitioner's father. The petition ends thus : " We beg to ask the Hon'ble Court to pass a decree according to the above-mentioned term for Rs. 10 a month for maintenance." On this petition also the order of the Court was that it should be filed. Then again on the 7th January 1921, the lady made a further application to the Magistrate for payment of arrears of maintenance to the amount of Rupees 346 and on the 8th February 1921 an order under section 438 of the Code, was made for the levy of the sum. Thereupon the Sessions Judge of Burdwan was invited by the present petitioner to make a reference to this Court with the result that this Court remanded the case to the Sub-Deputy Magistrate with certain directions, namely, that proper enquiries should be made on the four points set out, and that the case should be disposed of on that footing. The four points were, first, whether by the return of the wife to the husband's house towards the close of the year 1918, the order of the 14th September 1915, became inoperative ; secondly, whether by reason of the arrangement made in the beginning of the year 1919, the order of the 14th September, 1915, was superseded ; thirdly, whether if the order of the 14th September 1915, is still in force, it should now be cancelled under the provisions of section 488 sub-section (5) ; and, fourthly, what amount is due to the wife if the order of the 14th September 1915 is not inoperative and has not been superseded or cancelled.

On receipt of these directions the Sub-Deputy Magistrate proceeded to take evidence and arrived at a finding, on the 17th August 1921, to the effect that a sum of Rs. 346-13 as. was due by the husband to the wife. Thereupon the present petitioner again moved the Sessions Judge of Burdwan to make a reference to this Court. The learned Sessions Judge before otherwise dealing with the matter, remanded the case to the Sub-Deputy Magistrate in order that he might come to more explicit findings on the four points set out in the judgment of this Court. The Sub-Deputy Magistrate recorded such findings on the 20th December, but their effect was not to modify in any way the order which he had already made. Thereupon the Sessions Judge of Burdwan has referred the whole case to us with the recommendation that the order of the Sub-Deputy Magistrate should be set aside.

The matter for decision in this reference is, it appears to me, whether the decisions of the Magistrate on the four points are or are not correct. As regards the first point, namely, whether the order of the 14th September 1915, became inoperative by reason of the woman's having returned to live with her husband towards the end of the year 1918, it appears to me that the view taken by the Sub-Deputy Magistrate, is correct. A mere temporary stay of this kind, though it may have suspended the operation of the order, had not the effect of cancelling it in the way in which it could be cancelled under section 438 (5) of the Code. Moreover, the Magistrate found that the petition to which I have referred and which was filed by the lady on the 24th January 1919, was obtained by fraud. It is obvious that such a petition could not have the effect of cancelling the order dated the 14th September 1918.

The second point is of greater importance, namely, whether by reason of agreement made in the beginning of the year 1919, the order of the 14th September 1915, was superseded. It appears to me that when the petition of compromise was filed in the Court of the Sub Deputy Magistrate, the parties had the intention of effecting a complete settlement of all questions outstanding between them ; and it further seems to me that if there had been any intention of excluding the arrears of maintenance from the operation of the petition of compromise this would have been expressly mentioned therein. In my view, the decision of the learned Magistrate on the second point is correct and the intention of the parties, when they filed their petition, was, that the lady should abandon her claim to any arrears of maintenance which may have accrued due up to that date.

I think that the Sub-Deputy Magistrate has rightly decided the third point. It has been urged that the petitioner had not proper opportunity to place his case before the Court. But I am satisfied that he wilfully abstained from appearing when he had notice of the proceedings, and that this is not a just ground for disturbing the Magistrate's finding. It is certainly not proved that Parul Bala has been guilty of any irregular conduct ; and having regard to the treatment, she has had in the past, she has ample reason, as things at present are, for refusing to live in her husband's house. There is no ground therefore for cancellation under section 438 (5) of the order of the 14th September 1915.

In this view of the case it becomes unnecessary for this Court, to consider the fourth point which was referred to the Magistrate.

In the result, the reference of the learned Sessions Judge

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should be accepted only so far as it relates to the arrears of maintenance anterior to the 12th April 1919; as regards the arrears of maintenance subsequent to that date, the order of the learned Sub-Deputy Magistrate should be affirmed. It will be necessary in this view to return the case to the Sub-Deputy Magistrate in order that he may calculate, on this footing, the amount of arrears of maintenance due by the petitioner to his wife.

The order of the Sub-Deputy Magistrate as regards costs, will stand. We make no further order as to costs.

A. T. M.

Reference accepted in part.

APPELLATE CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Chotzner.*

ISUP ALI AND OTHERS

v.

GOUR CHANDRA DEB.*

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July, 10, 11.
August, 7.

Res judicata—Civil Procedure Code (Act V of 1908), Sec. 11 Expl. I—'Former suit'—Suits tried jointly—One appeal against two decrees—No order for consolidation—Res judicata, rules of, if applicable to appeal.

It is not the priority in the commencement of one action that renders the judgment obtained therein a bar to the recovery of a second judgment in another, but because the first judgment, when given, whether in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff in lieu thereof one of a higher nature: *Mutual First Insurance Co v. Harris* (1) and another case.

The doctrine of *res judicata* is applicable to all the stages of a suit, till it is finally terminated and is not confined to Court of first instance; it applies equally to the procedure of the first and second appellate Courts: *Balkishan v. Kishan Lal* (2).

A, B and C brought a suit against D for recovery of possession of certain land. A few days later, D and his brothers instituted against A, B and C a suit for

*Appeal from Appellate Decree No. 2241 of 1920, against the decree of W. A. Seaton Esq., District Judge of Chittagong, dated the 10th May, 1920, affirming that of Babu Jitendra Nath Sen, Munsiff of Hathazari, dated the 3rd August, 1910.

(1) (1877) 97 U. S. 33.

(2) (1888) 1, L. R. 11 All. 148.

establishment of their title to the homestead portion of the property involved in the first litigation. The relief in the first suit was valued at Rs 348, and that in the second suit at Rs 200. The two suits were tried jointly at the desire of the parties, as the disputed land and the causes of action were common to a certain extent. The first suit was dismissed, while the second was decreed. Thereupon, the plaintiffs in the first suit, who were the defendants in the second suit, preferred one appeal, which was directed against the decrees in both the suits and was valued at Rs. 548. Copies of both the decrees were attached to the memorandum, which, however, set out the name of D alone as the respondent :

Held, that the appeal preferred to the lower appellate Court was defective in two respects, namely, first, that contrary to established procedure [See *Rakhal v. Manmoitho* (1) and other cases], one appeal was preferred, without an order for consolidation by the Court against two distinct decrees in two separate suits ; secondly, that even treated as otherwise valid, the appeal was defective, in so far as it was intended to be an appeal in the second suit, inasmuch as some of the successful plaintiffs had not been joined as parties respondents.

That the decision of the question of title in the suit under appeal, was barred by the decision in the subsequent suit between the same parties and others, which terminated earlier in a victory for the respondent. That decision could not be collaterally attacked or implicitly ignored in appeal.

Appeal by the Plaintiffs.

Suit for confirmation or recovery of possession of land, upon establishment of title

The material facts appear from the judgment.

Babu Mahendra Nath Ray and *Moulvi Nurul Huq Chowdhury* for the Appellants.

Babu Narendra Kumar Das for the Respondent.

C. A. V.

The judgment of the Court was delivered by

Mookerjee J :—This is an appeal by the plaintiffs in a suit for confirmation or recovery of possession of land, upon establishment of title by inheritance and adverse possession. The suit was instituted on the 3rd July 1917, by Isup Ali, Goaj Ali and Basarat-ulla, sons of Basir Muhammad Talukdar, against Gour Chandra Deb, the son of Nehal Krishna Deb. A few days later, Gour Chandra Deb and his brothers instituted a suit against Isup Ali and his brothers for establishment of their title to the homestead portion of the property involved in the first litigation. The relief in the first suit was valued at Rs. 348, and that in the second suit at Rs. 200. The two suits were tried jointly at the desire of the parties, as the disputed land and the causes of action were common to a certain

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extent. The first suit was dismissed, while the second was decreed. Thereupon, the plaintiffs in the first suit, who were the defendants in the second suit, preferred an appeal to the District Judge. The appeal was directed against the decrees in both the suits and was valued at Rs. 548. Copies of both the decrees were attached to the memorandum, which, however, set out the name of Gour Chandra Deb alone as the respondent. The memorandum could not, consequently, be treated as a valid memorandum of appeal against the decree in the second suit. That decree enured to the benefit of Gour Chandra Deb and his brothers, and as the latter were not made parties to the appeal, they could not be prejudiced, even if the decree of the primary Court were reversed. Indeed, as pointed out in *Kali Dayal v. Nagendra Nath* (1), the appeal, treated as an appeal in the second suit, could not be heard, as, even if successful, it would be infructuous, because such of the plaintiffs as were not brought before the Court as respondents, would still retain the benefit of the decree of the primary Court. The appeal preferred to the lower appellate Court was, consequently, defective in two respects, namely, first, that contrary to established procedure, as explained in *Rakhal Chandra Tiwari v. Manmotho Nath Mitter* (2); *Rakhal v. Manmotho* (3) and *Mahabir v. Biseshwar* (4), one appeal was preferred, without an order for consolidation by the Court, against two distinct decrees in two separate suits; secondly, that even treated as otherwise valid, the appeal was defective, in so far as it was intended to be an appeal in the second suit, inasmuch as some of the successful plaintiffs had not been joined as parties respondents. In these circumstances, the appellants in this Court have conceded that the appeal to the District Judge must be deemed to have been an effective appeal, only in respect of the decree in the first suit, and that the attempt to make it an appeal against the decree in the second suit was abortive. The District Judge has dismissed the appeal on the merits. The position thus is that though there were two suits in the primary Court, decided by a common judgment, an appeal and a second appeal have been preferred in the first suit, while no appeal has been preferred in the second suit, with the result that the decree made therein has become final. On these facts, the respondent in the present appeal, which is directed against the decree of the District Judge made in affirmance of the decree of the primary Court in the first suit, contends

(1) (1919) 30 C. L. J. 217.

(2) (1910) 15 C. W. N. 994.

(3) (1914) 24 I. C. 438.

(4) (1917) 4 O. L. J. 512; 42 I. C. 424.

that the trial of the question in controversy is barred by *res judicata*. The substantial matter in dispute in the first suit, as in the second, was, whether one Aleyar Khan was the real or beneficial owner of the property. This question has been answered in favour of the plaintiffs in the second suit, one of whom, as we have seen is the defendant in the first suit. He is the respondent in this appeal, and he urges that the decision of this fundamental question, which forms the basis of the decree made in favour of himself and his brothers in the second suit, cannot now be re-agitated; in other words, he contends that if the matter were now reinvestigated, the decree in the second suit, which has never been directly challenged by way of appeal, would be collaterally attacked and imperilled.

The principle applicable to cases of this character was investigated in *Balkishan v. Kishan Lal* (1), by Mahmood, J. who had considered the matter also in his earlier judgments in *Chajju v. Sheo Sahai* (2) and *Kashi Nath v. Mukhta Prasad* (3). At that time, there was some controversy as to the meaning of the expression "former suit," the decision wherein may operate as *res judicata* in a subsequent suit. The doubt has now been set at rest by explanation I to section 11 of the Civil Procedure Code, 1908, which provides that the expression "former suit" denotes a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto. To put the matter tersely, the expression "former suit" means a previously decided suit, and the same rule applies to appeals. This was in fact the view adopted by Mahmood, J. in *Balkishan v. Kishan Lal* (1) and has been subsequently followed: *Ram Lal v. Chhab Nath* (4); *Beni Madho v. Indar Sahai* (5); *Gururajammah v. Venkata* (6). As Herman puts it in his commentaries on the Law of *Res judicata* (Vol. 1. p. 126), it is not the priority in the commencement of one action that renders the judgment obtained therein a bar to the recovery of a second judgment in another, but because the first judgment, when given, whether in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff in lieu thereof one of a higher nature: *Mutual First Insurance Co. v. Harris* (7); *Barber v. Morris* (8); Van Fleet on Former Adjudications, Vol. I. p. 87. From this standpoint, Mahmood, J. held in *Balkishan v.*

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(1) (1888) I. L. R. 11 All. 148.

(2) (1887) I. L. R. 10 All. 123.

(3) (1884) I. L. R. 6 All. 370.

(4) (1890) I. L. R. 12 All. 578.

(5) (1909) I. L. R. 32 All. 67.

(6) (1901) I. L. R. 24 Mad. 350.

(7) (1877) 97 U. S. 33.

(8) (1904) 132 Fed. 945; 67 L. R. A. 761.

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Kishan Lal (1), that the doctrine of *res judicata*, so far as it relates to prohibiting the re-trial of an issue, must refer, not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue; and the rule is not limited to the Courts of first instance, it applies equally to the procedure of the first and second appellate Courts, and, indeed, even to miscellaneous proceedings; see the decision of the Judicial Committee in *Hook v. Administrator General* (2). We are in complete agreement with the exposition of the law given by Mahmood, J. in the following passage of his judgment in *Balkishan v. Kishan Lal* (1).

"It seems to me that the main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants, *ne autem lites immortales essent, dum litigantes mortales sunt*. This saying of Voet is in accord with the maxims *nemo debet bis vexari pro una et eadem causa* and the broader maxim *interest reipublice ut sit finis litium*. This being so, the doctrine, so far as it relates to prohibiting the re-trial of an issue, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. For even in cases where the Judge has commenced the trial of an issue which is also an issue in a pending litigation, a final judgment pronounced meanwhile in such previous litigation, by a competent Court, (the identity of parties and other conditions being satisfied), should operate as *res judicata*, preventing the Judge dealing with the later litigation from adjudicating differently. If this is not done, it seems to me that the evil against which *res judicata* aims would not be removed and the doctrine itself would be defeated. So far as the justification of this view from the provisions of the Civil Procedure Code 1882, is concerned. I may say that the rule contained in section 13 is not limited to the Courts of first instance, that it applies equally to the procedure of the first and second appellate Courts by reason of sections 582 and 587 respectively, and indeed, even to miscellaneous proceedings by reason of the general provisions of section 647 of the Code."

This view has been repeatedly reaffirmed by the Allahabad High Court: *Ram Lal v. Chhab Nath* (3); *Zaharia v. Debia* (4); *Dakhni Din v. Syed Ali* (5); *Anant Das v. Udai Bhan* (6); *Ram Faqir v.*

(1) (1888) I. L. R. 11 All. 148.

(2) (1921) L. R. 48-I. A. 187; I. L. R. 48 Cal. 499; 33 C. L. J. 405.

(3) (1850) I. L. R. 12 All. 578.

(4) (1910) I. L. R. 33 All. 51.

(5) (1910) I. L. R. 33 All. 151.

(6) (1913) I. L. R. 35 All. 187.

Bindeshri (1) ; *Balhari v. Shiva* (2). A similar view has been adopted in the Punjab and in Burma *Nur v. Jamun* (3) ; *Mahomed Jan v. Dulichand* (4) ; *Raman v. Muthu* (5). A different rule was however adopted in *Panchanada v. Vaithinatha* (6). There, cross suits between the same parties, on the same facts, were tried together and judgment was given on the same day, but separate decrees were drawn up, and an appeal was preferred against one of the decrees alone. It was ruled that the decree unappealed did not operate as a bar, so as to preclude the appellate Court from dealing with the decree appealed against, because, it was said, the doctrine of *res judicata* has no application when the very object of the appeal, in substance, if not in form, is to get rid of the decision which is pleaded in bar. The opinion of the Court states that it would lead to startling results, if the Court were to hold that an appellate tribunal is precluded from dealing with a question, which comes before it on appeal, because an inferior Court, upon the same facts, but in a case other than the case under appeal, had given a decision which had not been appealed against, at the same time as the decision in the case under appeal. Two observations are pertinent in this connection ; first, that the requirements of the rules of procedure cannot always be ignored, on the allegation that they are technical and are matters of form, not of substance ; secondly, that a non-appealable decree may operate as *res judicata*, as explanation II to Sec. 11 of the Civil Procedure Code, 1908, prescribes that the competence of a Court shall be determined, irrespective of any provisions as to a right of appeal from the decision of such Court. This supersedes the decision, to the contrary effect, of the Madras High Court in *Avanasi v. Nachammal* (7) and of the Bombay High Court in *Govind v. Dhond* (8). It is worthy of note that the decisions in *Panchanada v. Vaithinatha* (6) and *Avanasi v. Nachammal* (7) were pronounced by the same Bench on the same date, and both proceeded on the assumption that the appealability of a decision affects the competence of a Court for purposes of *res judicata*. The effect of explanation II which affirms the contrary view that the competence of the jurisdiction of a Court does not depend on the right of appeal from its decisions, *Ram Faqir v. Bindeshri* (1) ; *Musaddi v. Jwala* (9) was

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(1) (1918) I. L. R. 41 All. 54.

(2) (1919) 18 A. L. J. 40.

(3) (1890) P. R. 153.

(4) 3 Lah. L. J. 473.

(5) (1921) 6 L. B. R. 93 ; 5 Bur. L. T. 199.

(6) (1905) I. L. R. 29 Mad. 333.

(7) (1905) I. L. R. 29 Mad. 195.

(8) (1890) I. L. R. 15 Bom. 104.

(9) (1912) 10 A. L. J. 106.

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overlooked, when the decision in *Panchanada v. Vaithinath* (1) was followed in *Ramasami v. Karuppan* (2). The later decision of the Madras High Court in *Bommadevara v. Venkatappaya* (3) is of no assistance in the solution of the question raised before us, as it merely lays down that where there are subordinate and dependent decrees, the reversal of the principal decree operates as a supersession of the subordinate decree; see *Ashutosh v. Upendra* (4). Reliance, however, has been placed by the appellants on the decisions of this Court in *Abdul Majid v. Jew Narain* (5) and *Mariamnissa v. Joynab* (6). The dicta in *Abdul v. Jew* (5), cannot be reconciled with the decision of the Judicial Committee in *Raja of Pittapur v. Buchi* (7), namely, that an estoppel is binding, notwithstanding that the suit which raises it relates to a different property. The decision is further based on the untenable view that the question of *res judicata* depends upon the state of facts as they exist at the date of the trial in the primary Court. On the other hand, the decision of the majority in *Mariam v. Joynab* (6), was dependent upon its special facts, although an opinion was expressed that when two suits have been tried together, either of them cannot be treated as the former suit in relation to the other. This view, as we have seen, cannot be maintained, when explanation I to section 11 is taken into account. The substance of the matter, then, is that the dicta in favour of the appellants to be found in the cases of *Abdul v. Jew* (5) and *Mariam v. Jaynab* (6), were pronounced, while the Code of 1882 was in force and before explanations I and II to section 11 of the Code of 1908 had been enacted. We cannot further overlook that the decision of this Court in *Midnapur Zemindari Co. v. Nityakali Dasi* (8), shows that if the same question is in controversy between the same parties in two distinct litigations, one after the other, but simultaneously pending, the final decision in the later suit, if given earlier, operates as *res judicata* in the earlier suit whose final stage is reached later. The rule of *res judicata* is moreover applicable to all the stages of a suit, till it is finally terminated and is not confined to Courts of first instance. We are clearly of opinion that, on principle, there is no escape from this position, and section

(1) (1905) I. L. R. 29 Mad. 333

(2) (1915) 29 M. L. J. 551.

(3) (1919) 37 M. L. J. 521.

(4) (1916) 24 C. L. J. 467; 21 C. W. N. 564.

(5) (1888) I. L. R. 16 Calc. 233.

(6) (1906) I. L. R. 33 Calc. 1101; 4 C. L. J. 149.

(7) (1884) L. R. 12 I. A. 16; I. L. R. 8 Mad. 219.

(8) (1914) 24 I. C. 243.

It unquestionably does not authorise a departure therefrom. The conclusion follows that the decision of the question of title in the suit now under appeal, is barred by the decision in the subsequent suit between the same parties and others, which has terminated earlier in a victory for the present respondent. That decision could have been, but never has been, challenged, and cannot now be collaterally attacked or implicitly ignored.

The result is that the decree made by the District Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

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Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

RAJENDRA KUMAR BOSE

v.

BROJENDRA KUMAR BOSE.*

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March, 9,

August, 30.

Partition—Property—Partial partition, when allowed—Co-tenant, right of, to partition.

Although partial partition by suit is allowed where different portions of the property lie in different jurisdictions, or some portion of the property is at the time incapable of partition or is from its nature impartible or is held jointly with strangers who cannot be joined as parties to a general suit for partition, these exceptions must not be taken to have frittered away the fundamental rule that a partition suit should embrace all the joint property. This rule is neither arbitrary nor technical; it is founded on sound and weighty reasons. If the rule were not recognised and firmly applied, multiplicity of litigation would be the inevitable result. If suits for partition were allowed to be instituted in fragments, the jurisdiction of the trial Court and the forum of appeal might be altered. The rule further ensures a just partition; parties might otherwise be greatly prejudiced as regards equitable distribution, retention of possession, liability for improvements, and adjustment of accounts. There may be very special cases where the application of the rule may be justly relaxed.

A co-tenant whose title to an undivided share of joint property is admitted or is clear, is entitled to partition as a matter of right; a difficulty in making a division of the subject-matter or a resulting prejudice to some of the co-tenants, is not a sufficient ground for refusing a partition.

Since partition can be claimed as a matter of right, a co-tenant is not required

* Appeal from Original Decree No. 74 of 1920, against the decree of Babu Debabrata Mukerjee, Subordinate Judge of Dacca, dated the 29th March, 1920.

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to make a demand or to agree upon terms prior to institution of suit. But although, as a general rule, all joint property of the co-tenants must be included in a partition suit, it is within the power of co-tenants, by mutual agreement, to make partition of a part only of the joint property, retaining the rest in common: *Darvill v. Roper* (1).

As a general rule, a partial partition cannot be compelled against co-tenants who do not consent thereto. But if some of the co-tenants desire to continue holding the moieties together and undivided, the Court may permit them to do so, and instead of making a separate allotment to each, set apart to all who so, desire, an allotment to be held by them jointly. If it appears, however, that all the defendants have already received all that is equitably due to them, the remainder may be awarded to the plaintiff; this is not partial but complete partition: *Hobson v. Sherwood* (2).

Appeal by the Defendant.

Suit for partition.

The material facts appear from the judgment.

Dr. Dwarka Nath Mitter and *Babu Hira Lal Chakrabarti* for the Appellant.

Babus Ram Chundar Mozumdar, Gunada Charan Sen and *Heramba Chandra Guha* for the Respondent.

C. A. V.

The judgment of the Court was delivered by

August, 30.

Mookerjee J.—This is an appeal by the defendant in a suit for partition. The plaintiff and the defendant are two brothers, governed by the Dayabhaga school of Hindu law. Under a testamentary disposition of their father, now deceased, they are entitled in equal shares to the properties in suit and many other properties. In this suit, the plaintiff seeks partition of an ancestral house at Srinagar, two houses at Dacca and a large number of movables. The defendant contends that all the joint properties should be included in the suit and divided by the decree therein. The Subordinate Judge has overruled this objection, and has made a preliminary decree. On the present appeal, the defendant has urged that the plaintiff should not be allowed to sue for partial partition.

The principles applicable to cases of this character are well settled. The general rule is that all property held in co-tenancy and nothing but property held in co-tenancy should be included in a partition suit. A co-tenant, whose title to an undivided share of joint property is admitted or is clear, is entitled to partition as a matter of right; a difficulty in making a division of the subject-matter or a resulting prejudice to some of the co-tenants, is not a sufficient

(1) (1855) 3 Drwry 294.

(2) (1841) 4 Beav. 184.

ground for refusing a partition; and it has sometimes been maintained that partition may be claimed, even though it be impossible to divide the property without materially impairing its value, or even totally destroying it: *Norris v. Le Neve* (1); *Parker v. Gerard* (2); *Bearing v. Nash* (3); *Calmady v. Calmady* (4); *Turner v. Morgan* (5); *Agar v. Fairfas* (6); *Clarendon v. Hornby* (7). Since partition can be claimed as a matter of right, a co-tenant is not required to make a demand or to agree upon terms prior to institution of suit. But although, as a general rule, all joint property of the co-tenants must be included in a partition suit, it is within the power of co-tenants, by mutual agreement, to make partition of a part only of the joint property, retaining the rest in common: *Darvill v. Roper* (8). The principle that a partition suit should include all the property of the co-tenancy is widely recognised, and it has been pointed out that if the rule were not enforced, a co-tenant might institute as many suits to partition the property as his caprice dictated. Consequently, a partial partition cannot, as a general rule, be compelled against co-tenants who do not consent thereto. But if some of the co-tenants desire to continue holding their moieties together and undivided, the Court may permit them to do so, and instead of making a separate allotment to each, set apart, to all who so desire, an allotment to be held by them jointly. If it appears, however, that all the defendants have already received all that is equitably due to them, the remainder may be awarded to the plaintiff; this is not partial but complete partition: *Hobson v. Sherwood* (9); *Clarendon v. Hornby* (7). The rule is enunciated in these or similar terms by text-writers of recognised authority. Thus, Freeman (*Cotenancy and Partition* section 508) states that a tract held in common cannot be partitioned by fragments, and a suit for partition should always embrace the whole tract held by the co-tenancy. But while it is indispensable that the whole tract should be embraced in the suit for partition, it does not follow that those who are mutually desirous of continuing the relation of co-tenancy among one another, are obliged to have their several portions allotted to them to hold in severalty. It is true that there are cases where a partial partition has been treated as improper and unauthorised under all circumstances: *Robertson v. Robertson* (10). But the

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- (1) (1744) 3 Atk. 83.
- (3) (1813) 1 V. & B. 551 (554).
- (5) (1803) 8 Ves. 143.
- (7) (1718) 1 P. Wms. 446.
- (9) (1841) 4 Beav. 184.

- (2) (1754) Amb. 236.
- (4) (1795) 2 Ves. Jun. 568.
- (6) (1808) 17 Ves. 533 (543).
- (8) (1855) 3 Drewry 294.
- (10) (1852) 2 Swan (Tenn) 199.

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weight of the authorities is in favour of the view that the plaintiff in partition is entitled to have his share set off, if the premises are capable of being divided, for, that is his object in instituting the proceedings; if the situation of the defendants is such as to render it for their interest to retain their portion together and undivided, there can be no possible objection in principle in permitting it to be done. To the same effect is the statement by Knapp (Partition p. 192) that common property cannot be partitioned in fragments: it is not the practice of the Court to cause or decree a partial partition. The established rule may accordingly be taken to be that a suit for partition should include all the lands of the co-tenancy, and if it does not, any party interested may insist that the omitted land or lands be included in the suit.

There is little doubt that the general principle enunciated above was recognised by Hindu jurists; see Mitakshara Chap. II Section. 10; Vishnu XV, 33; Narada XIII, 32; *Radha Churn v. Kripa Sindhu* (1); *Manjanatha v. Narayana* (2); *Sudarsanam v. Narasimhulu* (3); Jolly, Tagore Lectures on Partition p. 135.

The principle that a suit for a division of a portion of the family property cannot lie and must comprise the entire family property has been affirmed in numerous cases: *Nanabhai v. Nathabhai* (4); *Trimbak v. Narayan* (5); *Venkatesh v. Gaupaya* (6); *Gopal v. Narnapa* (7); *Parbati v. Ainuddeen* (8); *Upendra v. Gopee Nath* (9); *Haridas v. Pran Nath* (10); *Ramjoy v. Ram* (11); *Kalka v. Budree* (12); *Hoolas v. Man* (13); *Venkayya v. Lakshmayya* (14); *Jugoo v. Manoothur* (15); *Shiv v. Virappa* (16); *Kristiah v. Narasimham* (17); *Cheytt v. Bunwaree* (18); *Jogendra v. Jugobundhu*, (19); *Ram v. Rughoobur* (20); *Venkata v. Bhashya* (21); *Srimohan v. Macgregor* (22).

(1) (1879) I. L. R. 5 Calc. 474; 4 C. L. R. 428.

(2) (1882) I. L. R. 5 Mad. 362.

(3) (1901) I. L. R. 25 Mad. 149.

(4) (1870) 7 Bom. H. C. R. 46. A. C. J.

(5) (1874) 11 Bom. H. C. R. 69.

(6) (1876) Bom. P. J. 110.

(7) (1883) Bom. P. J. 3.

(8) (1881) I. L. R. 7 Calc. 577.

(9) (1883) I. L. R. 9 Calc. 817; 12 C. L. R. 356.

(10) (1886) I. L. R. 12 Calc. 566.

(11) (1881) 8 C. L. R. 367.

(12) (1871) 3 All. H. C. R. 267.

(13) (1868) 3 Agra H. C. R. 37.

(14) (1892) I. L. R. 16 Mad. 98.

(15) (1872) 19 W. R. 43.

(16) (1899) I. L. R. 24 Bom. 128.

(17) (1900) 10 M. L. J. 141; I. L. R. 23 Mad. 608.

(18) (1875) 23 W. R. 395.

(19) (1886) I. L. R. 14 Calc. 122.

(20) (1871) 15 W. R. 111.

(21) (1902) I. L. R. 25 Mad. 367.

(22) (1901) I. L. R. 28 Calc. 769.

Exceptions to the rule that a suit cannot lie for partition of a portion of the family property have been recognised when different portions of the family property are situated in different jurisdictions, and separate suits for separate portions have sometimes been allowed, where different rules of substantive or adjective law prevail in the different Courts: *Hari v. Gangapatrav* (1); *Ramacharya v. Anantacharya* (2); *Motiram v. Kanhya Lal* (3); *Punchanun v. Shib Chunder* (4); *Balaram v. Ramchandra* (5); *Abdul v. Badrudeen* (6); *Padmamani v. Jagadamba* (7); *Ram Mohan v. Mul Chand* (8); *Lachmana v. Terimul* (9); *Subba v. Rama* (10); *Jairam v. Atmaram* (11). Again, a suit for partial partition has been allowed when the portion excluded is not in the possession of co-parceners and may consequently be deemed not to be really available for partition: *Balkrishna v. Hari* (12); *Narayan v. Pandurang* (13); *Shiv v. Virappa* (14); *Kristayya v. Narasimham* (15); *Pattaravy v. Audimula* (16); *Gora Chand v. Basanta* (17). A suit for partial partition has also been allowed when the portion excepted is impartible property: *Mallika v. Durga Prasada* (18); *Parvathi v. Thirumalai* (19). In another class of cases, the rule has been relaxed, namely, where the portion excluded is held jointly with strangers who have no interest in the family partition: *Purushottam v. Atmaram* (20); *Venkata v. Chinnaiya* (21); *Chinna v. Suriya* (22); *Manjanatha v. Narayana* (23); *Venkayya v. Lakshmayya* (24); *Subramanya v. Padmanabha* (25); *Lachmi v. Janki* (26); *Ram Mohan v. Mul Chand* (8); *Ram Charan v. Ajudhia* (27); *Bunwari v. Daya Sunker* (28); *Gadadhar v. Balwant* (29); *Subbarasu v. Venkata* (30);

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(1) (1883) I. L. R. 7 Bom. 272.

(2) (1893) I. L. R. 18 Bom. 389.

(3) 2 Lah. L. J. 514.

(4) (1887) I. L. R. 14 Calc. 835.

(5) (1898) I. L. R. 22 Bom 922.

(6) (1904) I. L. R. 28 Mad. 216.

(7) (1871) 6 B. L. R. 134.

(8) (1905) I. L. R. 28 All. 39.

(9) 4 Mad. Jur. 241.

(10) (1862) 3 Mad. H. C. R. 376.

(11) (1880) I. L. R. 4 Bom. 482.

(12) (1871) 8 Bom. H. C. R. 64 A. C. J.

(13) (1875) 12 Bom. H. C. R. 143.

(14) (1899) 1 Bom. L. R. 620.

(15) (1900) I. L. R. 23 Mad. 608; 10 M. L. J. 141.

(16) (1870) 5 Mad. H. C. R. 419.

(17) (1911) 15 C. L. J. 258.

(18) (1900) L. R. 27 I. A. 151; I. L. R. 24 Mad. 147.

(19) (1886) I. L. R. 10 Mad. 334.

(20) (1899) I. L. R. 23 Bom. 597.

(21) (1870) 5 Mad. H. C. R. 166.

(22) (1882) I. L. R. 5 Mad. 196.

(23) (1882) I. L. R. 5 Mad. 362.

(24) (1892) I. L. R. 16 Mad. 98.

(25) (1896) I. L. R. 19 Mad. 267.

(26) (1901) I. L. R. 23 All. 216.

(27) (1905) I. L. R. 28 All. 50.

(28) (1909) 13 C. W. N. 815.

(29) (1883) Bom. P. J. 250.

(30) (1891) I. L. R. 15 Mad. 234.

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Iburamsa v. Thiru (1); *Hari v. Venkata* (2); *Kadegan v. Periya* (3); *Purushottam v. Atmaram* (4); *Lakshmi v. Janki* (5); *Ajodhya v. Mahadeo* (6); *Kailash v. Nityananda* (7). We are not concerned here with the question whether an alienee from a co-sharer is entitled to institute a suit for partition of the property he is interested in; upon that point there has been some divergence of judicial opinion, as is clear from the decisions reviewed in *Subba Row v. Annatha* (8). In such a contingency, two conflicting opinions have been maintained; on the one hand, it is urged that the purchaser is in precisely the same position as his transferor; on the other hand, it is said that the transfer really effects a severance, and the only joint property held in common by the transferee and the co-sharers of his transferor is what forms the subject-matter of the conveyance. The first alternative is supported by the decisions in *Iburamsa v. Thiru* (1); *Parbati v. Ainuddeen* (9); *Shiv v. Virappa* (10); *Maharaja of Bobbili v. Venkata* (11); *Padala v. Vettha* (12). The second alternative is favoured in *Chundernath v. Hur Narain* (13); *Mukunda v. Lehurau* (14); *Barahi v. Debkamini* (15); *Hemadri v. Ramani* (16); *Uma Sundari v. Binode Lal* (17); *Subba v. Annatha* (8); *Hanmandas v. Vallabdas* (18); *Kailash v. Nityananda* (7); *Hari v. Venkata* (19); *Chinun v. Kalimuthu* (20); *Hem Chandra v. Hemanta Kumar* (21); *Ramtaran v. Hari Charan* (22); *Sris v. Mahima* (23); *Dhulabhai v. Lala* (24). But although partial partition by suit is allowed where different portions of the property lie in different jurisdictions, or some portion of the property is at the time incapable of partition or is from its nature impartible or is held jointly with strangers who cannot be joined as parties to a general suit for partition, these exceptions must not be taken to have frittered away the fundamental rule that a partition suit should embrace all the joint property. That rule is

(1) (1910) I. L. R. 34 Mad. 269.

(3) (1903) 13 M. L. J. 477.

(5) (1901) I. L. R. 23 All 216.

(7) (1909) 11 C. L. J. 384.

(9) (1881) I. L. R. 7 Calc. 577.

(11) (1914) I. L. R. 39 Mad. 265.

(13) (1881) I. L. R. 7 Calc. 153.

(15) (1892) I. L. R. 20 Calc. 682.

(17) (1907) I. L. R. 34 Calc. 1026.

(19) (1910) I. L. R. 34 Mad. 402.

(21) (1914) 19 C. W. N. 356.

(23) (1915) 23 C. L. J. 231.

(2) (1910) I. L. R. 34 Mad. 402.

(4) (1899) I. L. R. 23 Bom. 597.

(6) (1909) 3 I. C. 9.

(8) (1912) 23 M. L. J. 64.

(10) (1899) I. L. R. 24 Bom. 128.

(12) (1911) 2 Mad. W. N. 382.

(14) (1892) I. L. R. 20 Calc. 379.

(16) (1897) I. L. R. 24 Calc. 575.

(18) (1918) I. L. R. 43 Bom. 17.

(20) (1910) I. L. R. 35 Mad. 47 F.B.

(22) (1913) 18 C. L. J. 556.

(24) (1921) 23 Bom. L. R. 777.

recognised in a long series of decisions : *Lalljeet v. Raj Coomar* (1); *Ram Lochun v. Rughoobur* (2); *Hari v. Ganpatrav* (3); *Jogendra v. Jugobundhu* (4); *Satya Kumar v. Satya Kripal* (5); *Radha Kan'a v. Bipro Das* (6); *Bavuddeen v. Essaff* (7); *Kai'ash v. Nityananda* (8); *Koor Hasmat v. Sunder Das* (9); *Haridas v. Pran Nath* (10); *Jogendra v. Baladeo* (11); *Habibur v. Asita* (12); *Mahomed v. Mahomed* (13); *Upondra v. Umesb* (14); *Monsharum v. Gonesh* (15); *Mukunda Lal v. Jogesh* (16); *Benimadhab v. Gobind* (17); *Shiv v. Virappa* (18); *Doman v. Prokash* (19); *Ranku v. Hukmi* (20); *Baruga v. Nundigam* (21). The decisions mentioned on behalf of the respondent cannot be deemed to have abrogated this rule : *Hem Chandra v. Hemanta Kumari* (22); *Kali Charan v. Kiranbala* (23); *Ram Mohan v. Mul Chand* (24); *Durgacharan v. Enamol* (25).

The rule that a partition suit should embrace all the joint property is neither arbitrary nor technical; it is founded on sound and weighty reasons. If the rule were not recognised and firmly applied, multiplicity of litigation would be the inevitable result. If suits for partition were allowed to be instituted in fragments, the jurisdiction of the trial Court and the forum of appeal might be altered; it might be of paramount importance to a party litigant whether he should have a first appeal or a second appeal to the High Court, and whether he should at all be permitted to seek the judgment of the Judicial Committee with regard to the matters in controversy. The rule further ensures a just partition; parties might otherwise be greatly prejudiced as regards equitable distribution, retention of possession, liability for improvements, and adjustment of accounts. It need not be disputed that there may be very special cases where the application of the rule may be justly relaxed. The case

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(1) (1876) 25 W. R. 353.

(3) (1883) I. L. R. 7 Bom. 272.

(5) (1909) 10 C. L. J. 503.

(7) (1909) 6 Mad. L. T. 156.

(9) (1885) I. L. R. 11 Calc. 395.

(11) (1907) I. L. R. 35 Calc. 961; 6 C. L. J. 735.

(12) (1908) 12 C. W. N. 640.

(14) (1910) 15 C. W. N. 375.

(16) (1916) 20 C. W. N. 1276; 1 Pat L. J. 393.

(17) (1916) 22 C. W. N. 669.

(19) (1913) 18 I. C. 866.

(21) (1911) 10 M. L. T. 313.

(23) (1919) 29 C. L. J. 494.

(25) (1920) 60 I. C. 762.

(2) (1871) 15 W. R. 111.

(4) (1886) I. L. R. 14 Calc. 122.

(6) (1904) 1 C. L. J. 40.

(8) (1909) 11 C. L. J. 354.

(10) (1886) I. L. R. 12 Calc. 566.

(13) (1911) 15 C. W. N. 677.

(15) (1912) 17 C. W. N. 521.

(18) (1899) I. L. R. 24 Bom. 128.

(20) (1917) P. L. R. 2.

(22) (1914) 19 C. W. N. 356.

(24) (1905) I. L. R. 28 All 39.

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before us, however, is not of an exceptional description. The plaintiff asserts that if all the joint properties were included in the suit, it would take a long time to complete the partition. There is no substance in this contention. The two brothers have fallen out, and the Subordinate Judge has found that there is great bitterness of feeling between them. There can be no room for doubt that the sooner they cease to be joint owners, the better for them. The partition may be expedited if suitable arrangements are made; for instance, there is no reason why different surveyors and valuers should not be employed to deal with the various properties; and whoever may be appointed commissioner, may have such assistance placed at his disposal that the work of partition may be speedily completed.

The result is that this appeal is allowed and the preliminary decree made by the Subordinate Judge set aside. The case will be remanded to him for retrial. The joint properties owned by the two brothers will all be included in the suit and will be dealt with in such manner as the Court may consider consistent with justice, equity and good conscience. If the plaintiff declines to have a partition of the entire joint estate, the suit will stand dismissed with costs in both Courts. The appellant is entitled to his costs of this appeal. The hearing fee will be assessed at 15 gold mohurs. The costs in the trial Court, before and after remand, will be in the discretion of that Court.

A. T. M.

Appeal allowed; Case remanded.

PRIVY COUNCIL.

PRESENT :—*Viscount Cave, Lord Shaw, Sir John Edge and
Mr. Ameer Ali.*

CHIDAMBARA SIVAPRAKASA PANDARA SANNADHIGAL

v.

VEERAMAREDDI alias MOOKAREDDI.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS]

Land tenure in Madras—Inam grant—Absence of presumption—Occupancy right—Legislation pendente lite—Estates Land Act (I of 1908)—Appellate Court, powers of—Code of Civil Procedure (Act V of 1908) sections 100, 103, O. 41 r. 25.

A grant of a village in 1743 to the Mutt did not expressly grant both the Melwaram and Kudivaram rights to the grantee. The appellant sued to eject the tenants respondents from their holdings. The trial Court held on the evidence that the tenants had established their occupancy right in their holdings by their dealings with such right for over a century. The District Court on appeal affirmed this view of the trial Court but directed ejectment in some cases on the basis of muchilkas filed by the appellant. Both parties preferred second appeals to the High Court from the decrees against them. Meanwhile the Estates Land Act was passed. The High Court, in view of the provisions of section 6 of the Act, directed the District Judge to submit a finding on the question whether the grant to the appellant was of the land revenue or of the Kudivaram also. The District Judge found that the grant was only of the land revenue, but the finding was based merely on the construction of the grant and on certain presumptions and not upon the evidence in the case. The High Court was of opinion that this finding was neither satisfactory nor sufficient. The matter was sent back to the District Judge who failed to come to any definite conclusion on the question. The High Court sent it to the District Court a third time for a definite finding on the evidence on record.

The District Judge returned findings confirming the findings of the trial Court. The High Court accepted the findings and dismissed the suits :

Held, (1) that the High Court had power to call for definite findings on facts from the lower appellate Court ; (2) that there is no question of onus or presumption where the rights of the parties are to be determined on the evidence on record ; and (3) that the tenants had established their occupancy right by proper evidence : *Seturatnam Aiyar v. Venkatachala Goundan* (1) followed ; *Suryanarayana v. Palanna* (2) ; *Upadrashta Venkatasastrulu v. Divi Seetharamudu* (3) distinguished. *Muthu Goundan v. Perumal Iyer* (4) : dissented from.

No opinion was expressed as to whether Act I of 1908 applied to rights in litigation at the time of the passing of the Act.

Consolidated appeals by special leave, from 5 decrees of the High Court at Madras, affirming four and reversing one decree of

(1) (1919) L. R. 47 I. A. 76 ; I. L. R. 43 Mad. 567.

(2) (1918) L. R. 45 I. A. 209.

(3) (1919) L. R. 46 I. A. 123 ; 30 C. L. J. 441.

(4) (1920) I. L. R. 44 Mad. 588 F. B.

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the District Judge of Trichinopoly on appeal from the Court of the District Munsif of Kulitalai.

The five suits out of which the present appeal arose were instituted by the appellant in 1904 in the District Munsif's Court at Kulitalai for ejectment of the respondents from their holdings. The plea of the respondents was that they are occupancy tenants who cannot be ejected. The Munsif dismissed the suits. The District Judge on appeal confirmed the decrees in three suits and reversed them in two. The High Court, on further appeal, dismissed all the suits. Hence the present consolidated appeal. Special leave was granted to the appellant as the suits were test suits. The terms of the inam grant and all the facts including the course of the proceedings in the Indian Courts appear fully from the judgment of their Lordships.

De Gruyther K. C. and *Brown* for the Appellant: The High Court was wrong in calling for findings three times when the District Judge gave his opinion that the evidence showed that the respondents in two of the suits had no occupancy rights in the lands. The powers of the High Court in second appeals are regulated by section 100 of the Code of Civil Procedure. The grant being an old one of 1743, the presumption should have been made that it was of both the *warums*: *Suryanarayana v. Patanna* (1); *Upadrashta Venkatasastrulu v. Divi Setharamudu* (2). This was the view adopted in a recent Full Bench case in Madras: *Muthu Goundan v. Perumal Iyen* (3).

The burden of proof was wrongly thrown on the appellant. Reference was also made to *Sethuratnam Aiyar v. Venkatachala Goundan* (4); *Myandi Chettiar v. Chokalingam Pillay* (5) and *Durga Choudhrani v. Jawahir Singh* (6).

Dunne K. C. and *Dube* for the Respondents: The High Court had jurisdiction in second appeals to call for findings on questions of fact where the lower appellate Court omitted to find on any issue material for the decision of the case. Section 103 provides that the High Court may itself determine the issue when there was sufficient evidence on the record. The Court acted under order XLI rule 25 of the Code and called for findings: *Sethuratnam Aiyar v. Venkatachala* (4) is conclusive on this point. *Suryanarayana v. Patanna* (1) and *Upadrashta Venkatasastrulu v. Divi Setharamudu* (2)

(1) (1918) L. R. 45 I. A. 209.

(2) (1919) L. R. 46 I. A. 123; 30 C. L. J. 441.

(3) (1920) L. R. 44 Mad. 588, F. B.

(4) (1919) L. R. 47 I. A. 76; I. L. R. 43 Mad. 567.

(5) (1904) L. R. 31 I. A. 83; I. L. R. 27 Mad. 291.

(6) (1890) L. R. 17 I. A. 122; I. L. R. 18 Calc. 23.

are not authorities for the proposition that a presumption should be made in favour of the grantee under an old grant. The Board dealt with those cases on the facts established in them. This was distinctly pointed out in the judgment of the Board in the later case.

De Gruyther replied.

The judgment of their Lordships was delivered by

Mr. Ameer Ali :—These several consolidated appeals arise out of five suits brought by the plaintiff on the 27th July, 1904, in the Court of the District Munsif of Kulitalai in the Madras Presidency, in his capacity of head of a Mutt, to eject the defendants from the lands in their occupation in the village of Karappudayanpatti, which he alleged belonged to his Mutt. The defendants in the suit are cultivating tenants holding separate lands unconnected with each other. Accordingly, separate suits were brought against them.

The plaintiff's case is that in the year 1743 the Polygar of Turayur, who owned the estate within which the village is situated, granted to the head of the Mutt at the time the village in question; and that since then the successive holders of the office have been in possession and enjoyment not only of the right to the receipt of the dues payable by the tenants to the landlord, usually called in the Madras Presidency the *melavaram*, but also of the right to the actual occupancy of the lands technically called the *kudiwaram*.

The five suits that were brought in the Munsif's Court were numbered 676, 677, 720, 721 and 722 of 1904. In suit No. 676 the plaintiff alleged that the particular tenant, for whose ejectment he was suing, held the land in dispute under a *muchilika* executed by the defendant's predecessor on the 18th June, 1880, by which he bound himself to surrender the land in his occupation on failure to pay rent. In suit No. 720 the plaintiff's action related to two items of land, in respect of which he alleged that the defendant's father had executed two *muchilikas* on the 19th April, 1894, and the 2nd June, 1894, respectively. With regard to suits 721 and 722, the plaintiff's suit rests on his general allegation, that as under the grant he is entitled to both the rights he claimed in the land—viz., the right to receive the rent as well as the right to occupy the lands—he was entitled to eject the defendants, who were tenants at will. In suit No. 722 he appears to have also set up an oral lease. In suit No. 677 the plaintiff relied upon a *muchilika* executed on the 24th July, 1893, by the defendant's brother.

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The defendants in all the cases denied the right of the plaintiff to eject them from the lands in their occupation and under their cultivation ; they alleged that he was only entitled to the *melavaram* and not to the *kudiwaram*, and that they and their predecessors had held their lands from times immemorial and possessed and exercised the full rights of occupancy tenants to the knowledge of, and with the acquiescence of, the plaintiff and his predecessors. They further charged that the *muchilikas* produced and relied upon by the plaintiff were fabricated documents concocted for the purpose of destroying their old and hereditary right in the lands in their occupation.

Upon these allegations the parties went to trial. The District Munsif framed two principal issues, which were common to all the cases, viz. :—

(1) Whether the plaintiff is entitled to the plaintiff land [that is, the land in suit] itself or only to the *tirwa* (rent) thereon ?

(2) Is the defendant entitled to the occupancy right in the land by custom and prescription ?

The other issues related to the genuineness of the *muchilikas* and to the amount of rent, &c.

The first two issues being common to all the suits, by consent of parties the five actions were tried together, and, as the trial Judge states at the beginning of his judgment, the whole evidence was adduced in suit No. 676, and was “ used as evidence in all the connected suits.”

The inam grant on which the plaintiff's claim rests is exhibit “ A.” After reciting by whom and to whom the gift is made, the document proceeds thus :—

“ The village gifted to our Swami out of our several villages is Karappudayanpatti, to the north of Uppiliyapuram, east of Vayirichettipalayam, south of Kottapatti and west of Sokkapuram. As we have gifted it most willingly to the Swami, you shall for ever have dominion over and enjoy the wet and dry lands, tope, we'l, betel garden, &c., water, tree, stone, treasures, &c., found therein and live happily. Further, what we command to be done for the Gurupooja day is this. We command that Gurupooja shall be conducted by collecting at the rate of 4 measures of grain per plough in respect of *Agraharam*, *Sarvamaniyam*, *Umbalam*, &c., including wet and dry lands in the whole of our Turaiyur State. You shall accordingly conduct Gurupooja every year and shall not omit to collect at the rate of 4 measures of grain in respect of dry and wet

lands also in the whole of Turaiyur State. You shall enjoy the whole of Karuppudayanpatti village. Further, you shall, as ordered by our predecessors, receive always *Mahamai* and allowance of rice and money for extra expenses. The Audeenam shall, in continuous succession, have dominion over and enjoy for ever, the village, Gurupooja kattalai, rice allowance, &c. He who helps this charity by thought, word or deed, will be blessed with happiness and live long in the same manner as one who establishes temple of several crores of *Sivalingams* in such holy places as Benares, Chidambaram, Tiruvalur, Arunachalam, Srikalahasti, Conjee, Kalugugundram, Kumbakonam, Rameswaram, &c."

The grant was recognized by the Inam authorities in 1865. But the Inam proceedings furnish no indication regarding the extent of the rights covered by it. Both sides in support of their respective contentions produced a mass of evidence, which the District Munsif, in a singularly well-balanced and exhaustive judgment, has analyzed with great industry. He held on the evidence that the defendants had proved they had been in occupation of their respective lands from very early times, and had been dealing with them as lands in which they had full occupancy rights, that they had been selling, mortgaging, making improvements, and that when any portion of the same was taken up for public purposes, they had claimed and received compensation from Government. He held further that the plaintiff had utterly failed to show that the defendants had been let into possession by his predecessors or by himself, or to rebut the testimony they had produced in establishment of their right of occupancy. His main judgment is in suit No. 676. He also found that the documents the plaintiff had produced in support of his claim, together with the *muchilikas* on which he relied in the three cases, had been fabricated with the object of destroying the tenants' right in their lands. He accordingly dismissed the five suits save and except as regards certain claims for rent.

The plaintiff appealed to the District Court of Trichinopoly against the District Munsif's decrees, and these appeals were numbered as follows :—Appeal 39 of 1908 (suit No. 676) ; Appeal 41 of 1908 (suit No. 720) ; Appeal 42 of 1908 (suit No. 721) ; Appeal 43 of 1908 (suit No. 722) ; Appeal 40 of 1908 (suit No. 677).

It is necessary to give the numbers of the appeals as well as of the suits, in view of the complication that enters into the determina-

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tion of the cases owing to the course the proceedings took in the subsequent stages.

In appeal No. 39 (suit No. 676) the officiating District Judge, Mr. Thornton, dismissed the appeal on the ground "that he did not consider the plaintiff had established he was entitled to both the *warams* in all the cultivated lands in the village, nor had he proved the terms of their tenancy." In appeal No. 40 (suit No. 677), in which the plaintiff had put forward a *muchilika* numbered in the Munsif's Court as exhibit "O," the District Judge set aside the decree, and in reversal of the Munsif's order made a decree in favour of the plaintiff for ejectment of the tenant. In appeal No. 41 (suit 720) he agreed with the Munsif as to item covered by *muchilika* "O 1," and accordingly dismissed the plaintiff's appeal with respect to that item, but he differed from the Munsif as to the item covered by *muchilika* "O 2," and accordingly decreed ejectment in respect thereof. In appeals Nos. 42 and 43 (suits Nos. 721 and 722) he affirmed the Munsif's decrees.

Both parties appealed to the High Court against the decrees, which operated severally against them. By the time the appeals reached the High Court, the Madras Estates Land Act (I of 1908) had come into force, and accordingly the defendant, against whom a decree for ejectment had been made by the officiating District Judge and who was appellant in second appeal 544 of 1909, filed, on the 27th September, 1910, an additional ground of appeal against his order.

All these second appeals came on for hearing before the High Court on the 14th August, 1911, but in view of the provisions of section 6 of Act I of 1908 and the contentions of the parties, the learned Judges considered it necessary to obtain from the officiating District Judge a finding on the following point :—

"Whether the grant to the plaintiff was of the land revenue or of the *kudivaram* also? Opinions have no doubt been expressed in the judgments of the lower Courts on the point, but the question was never tried with reference to section 6 of the Madras Estates Land Act."

Section 6 will be referred to later on.

The cases accordingly went back to the officiating District Judge, who returned the appeals to the High Court with the following "finding" :—

"But it seems to me that, seeing that Exhibit 'A' purports to grant all the land in the village absolutely to the plaintiff's predecessor-in-title, and that the plaintiff is admittedly entitled to both *warams*

in 70 *cawnies* while there are no tenants on 77 of the remaining 185 *cawnies* in the village, the burden lies on the defendants to show that their predecessors-in-title were cultivating tenants at the time of the grant (*see also* the case reported at page 639 Madras Weekly Notes, 1910), and that in the absence of proof of this, there can be no presumption that there were any cultivating tenants in the village at the date of the grant, or that the zamindar was not the owner of both *warams* in the land comprised in the grant. My finding on the issue sent down with reference to section 6 of the Madras Estates Land Act therefore is that the grant to the plaintiff was an absolute grant of all the land in the village, and was not a grant of the land revenue alone to a person not owning the *kudiwaram* thereof."

On the return of this "finding" to the High Court, the learned Judges considered it neither satisfactory nor sufficient. They express their views in the following terms :—

"The learned District Judge has not, so far as it appears to us, considered all this mass of evidence, and he seems to have based his conclusion on the language of Exhibit 'A' and on certain presumption which, according to him, arises from the facts that the plaintiff is admittedly entitled to both *warams* in 70 *cawnies* of land in the village and that about 77 other *cawnies* are waste. He throws the burden on the defendants to prove that their predecessors-in-title were cultivating tenants at the time of the grant. We are not disposed to express any opinion on the question of presumptions, because, as a matter of fact, there is considerable evidence upon which the points in issue can be decided one way or the other. But we wish to point out that there is no burden on the defendants to show that their predecessors-in-title were cultivating tenants at the time of the grant. If they succeed in showing that at the time of the grant the land was in the occupation of cultivating tenants, that might be sufficient to raise a presumption in their favour. We would therefore ask the District Judge to return a fresh finding, on the issue remitted to him, and he will also return a finding on the second issue in the case, namely, "Is the defendant entitled to the occupancy right in the land by custom or by prescription?"

The officiating District Judge does not appear to have applied his mind to the determination of the question involved in the second issue. It was now expressly and clearly brought to his notice.

On the return of the cases to the officiating District Judge, that officer, even with the fresh evidence the plaintiff was allowed to produce, found himself unable to come to any definite conclusion.

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The end of his judgment shows that he was not clear at all in his mind as to the conclusion to be derived from the evidence, and he expressed his difficulty in the following words ;—

"I do not see therefore how it is possible to say whether the grant to the plaintiff was of land revenue or of *kudivaram* also."

With these remarks the appeals were re-submitted to the High Court.

Upon the return of the appeals to the High Court the learned Judges again found that neither had the evidence been properly considered, nor had the issue to which the attention of the officiating District Judge had been expressly called been determined ; and they expressed their view as follows :—

"We are not disposed to express any opinion on the question of presumption *because as a matter of fact there is considerable evidence upon which the issue can be decided one way or the other.*

"The finding again submitted by the District Judge after this remand order does not at all show that the District Judge addressed himself seriously to a consideration of the mass of evidence considered by the District Munsif. The Judge says he is 'in a position of some difficulty,' and in a short paragraph (paragraph 3 of the finding paper) says that it is not possible to say one way or the other on that point. We are unable to accept the findings and we request the present District Judge to submit fresh findings on the two issues mentioned in the second remand order after detailed consideration of the evidence and with reference to the above remarks, irrespective of the question of onus and presumption."

The case had accordingly to be remitted once more to the District Court for a proper finding. By that time the permanent incumbent of the office, Mr. Harding, seems to have resumed work. He considered the case on the evidence irrespective of any presumption, and on the 30th September, 1914, embodied his conclusions into definite findings of fact as required by the High Court. He found on the evidence, in agreement with the District Munsif, that the defendant tenants had been in occupation of the lands for a very long time, that they had been dealing with their holdings and the lands in their occupation as tenants entitled to occupancy rights, that they had been transferring their holdings, partitioning the same among themselves, making improvements on the land, receiving compensation for land taken up from their holdings by Government ; and that the plaintiff had not only utterly failed to rebut the inference arising from those facts, but had fabricated the documents

with which he came to support his claim. He accordingly returned the appeals with the finding as follows :—

"II. It is unnecessary to say more. A zamindar could only gift the *melwaram* of occupied and both *warams* of unoccupied lands, and we find in actual fact that the holdings and dealings have been as they must be if that supposition is correct. From 1829 onwards the ryots or tenants in many cases have partitioned their properties or sold them to Government or to one another, and plaintiff has accepted these things from 1870 onwards at any rate. Plaintiff now holds *kudivaram* rights in many lands not by his grant but by some subsequent acquisitions. But he never held it in suit lands which are neither *pannai* nor waste, and in 1901 he was found by the Deputy Collector to be illegally taking possession of lands and this was upheld by the High Court. He is no doubt trying to get the *kudivaram* of the whole village, but his claim thereto is entirely baseless.

"I find that the grant was of the *melwaram* only of occupied lands and of both *warams* of unoccupied lands. Defendants or their predecessors have always had the occupancy rights in their holdings, and were not affected by the gift from the zamindar to the Inamdar."

The learned Judges of the High Court, upon the return of the above finding, held as follows :—

"It must be conceded in favour of the plaintiff that we expected the learned District Judge to discuss the evidence at somewhat greater length than he has done, we having indicated in our remand order that the District Munsif had devoted about 85 paragraphs to the consideration of that evidence, and that we required to be reasonably satisfied that the conclusions of the learned District Judge are arrived at after a careful consideration of the whole evidence.

"But we do not think that we are entitled to hold that full consideration has not been bestowed by the District Judge on the whole evidence before he arrived at the findings now submitted by him, and we therefore accept the same.

"The result is that second appeals Nos. 515 to 518 will stand dismissed with costs, while second appeal No. 544 of 1909 will be allowed with costs in this and in the lower appellate Court."

From these decrees the plaintiff has now appealed to His Majesty in Council, and it is contended on his behalf that the High Court acted without jurisdiction in remitting the appeals to the District Judge for a proper finding. The argument proceeds on

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the same misapprehension of the law, as was pointed out by the Board in the case of *Seturatham Aiyar v. Venkatachala Gounden* (1). It is to be observed that the Indian legislature, in its anxiety to prevent the High Court from being inundated with second appeals in trifling matters, has provided in section 100 of the Civil Procedure Code that such appeals shall lie to the High Court only on the following grounds :—

“(1) Save where otherwise expressly provided in the body of this Code or by any another law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely :—

“(a) the decision being contrary to law or to some usage having the force of law.

“(b) the decision having failed to determine some material issue of law or usage having the force of law.

“(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.”

At the same time, in order to avoid gross miscarriage of justice resulting from the omission by the lower appellate Court to determine any issue of fact or to come to a definite conclusion on a set of facts, it has made two distinct provisions. By section 103 the High Court itself is vested with the power when the evidence on the record is sufficient, to determine any issue of fact necessary for the disposal of the appeal, but not determined by the lower appellate Court.

By rule 25, order XLI, it is further provided :—

“Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required ;

“And such Court shall proceed to try such issues and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.”

The High Court had thus the power of determining the issue left undetermined by the officiating District Judge on the evidence

on the record, or of remitting the case to the lower Court for a finding on that issue, with liberty to the parties to adduce additional evidence if they chose to do so. The learned Judges of the High Court chose the latter, which, under the law, was fully within their competence. The case was remitted three times because the officiating District Judge in the first instance misunderstood the order of the High Court, and in the second instance expressed himself as unable to come to a definite conclusion. The High Court, did not in the present case, as in *Seturatnam Aiyar v. Venkatachala Gounden*, (1) remand it under order XLI, rule 23, of the Civil Procedure Code, but under rule 25. The remarks that follow in the judgment in *Seturatnam Aiyar's* case (1) explain the reason why the remand in that case, as in the present, became necessary. "In the opinion of the learned Judges of the High Court," say their Lordships, "the District Judge had omitted to determine a question of fact which appeared to them essential to the right decision of the suit on the merits; he had failed to consider whether, apart from the particular contract to which his attention was exclusively directed, there was evidence on which to hold that from their inception the holdings of the defendants were permanent or in the nature of occupancy rights."

As already observed, the Madras Act I of 1908 had come into force on the 1st July of that year, whilst the appeals in these cases were pending before the High Court. In view of the plaintiff's contentions, which have travelled over a wide range, and also of the question relating to the grant, it becomes necessary to examine briefly the provisions of the statute. The preamble states the object of the enactment in the following words :—

"Whereas it is expedient to amend and declare the law relating to the holding of land in estates in the Presidency of Madras; It is hereby enacted as follows, &c. :"

Clause *d* in section 3 defines the expression "estate" in the Act to mean—

"Any village of which the land revenue alone has been granted in Inam to a person not owning the *kudivaram* thereof provided that the grant has been made confirmed or recognized by the British Government or any separate part of such village."

Section 3 gives a definition of the words "private land" as meaning the "domain or home-farm land" [expressions borrowed from English law] of a landholder by whatever designation known, such as *kambatcam*, *khas*, *sir* or *pannai*. It defines the words "ryot"

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and "occupancy ryot," and declares "ryoti land" to mean "cultivable land in an estate other than private land." This definition includes other varieties of land to which no specific reference is necessary.

It also defines "old waste" as meaning any land in the estate which, not being private land,

"(1) has at the time of letting by the landholder been owned and possessed by him or his predecessors in title for a continuous period of not less than ten years and has continuously remained uncultivated during the time, such period being either after or partly before and partly after the passing of this Act, or within twenty years before the passing of this Act, or

"(2) has at the time of any letting by the landholder after the passing of this Act remained without any occupancy rights, being held therein at any time within a continuous period of not less than ten years immediately prior to such letting."

Section 8 deals with what is called "the merger of occupancy right." It declares :—

"(1) Whenever before or after the commencement of this Act the entire interests of the landholder and the occupancy ryot in any land in the holding have become united by transfer, succession or otherwise in the same person, such person shall have no right to hold the land as a ryot but shall hold it as a landholder; but nothing in this sub-section shall prejudicially affect the rights of any third person."

And clause (3) provides —

"The merger of the occupancy right under sub-sections (1) and (2) shall not have the effect of converting ryoti land into private land."

Section 10, clause 1, declares that "all rights of occupancy shall be heritable, and shall be transferable by sale, gift or otherwise."

Clause 2 provides :—

"If a ryot dies intestate in respect of a right of occupancy and without leaving any heirs except the Crown, his right of occupancy shall be extinguished, but the land in respect of which he had such right of occupancy shall not cease to be ryoti land."

Section 13 declares the right of the occupancy ryot to make improvements on the land in his occupation or "in respect of his holding."

Coming now to section 6, clause 1, it runs thus :—

"Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to posses-

sion of ryoti land not being old waste situated in the estate of such landholder shall have a permanent right of occupancy in his holding; but nothing contained in this sub-section shall affect any permanent right of occupancy that may have been acquired in land which was old waste before the commencement of this Act."

Chapter XII of the Act deals with the landlord's private land. Section 181 provides that nothing in the previous sections will confer a right of occupancy in the landlord's "private lands," but that nothing in that section shall prevent a landholder from converting his private land into ryoti land. Chapter XIV provides that no contract between the landlord and a ryot shall take away the right of an occupancy ryot, or limit his right to use the land as provided by law.

In declaring the rights of the occupancy ryots and emphasizing the distinction between the landlord's "private lands" and "the ryoti" lands, the new Act affirmed the old customary law that had always been recognized by the British administration. Apart from rules relating to procedure and the jurisdiction of the revenue Courts, it created one new right in order to settle the constant disputes between landlords and tenants which had been going on for nearly a century; it gave occupancy rights to all ryots in occupation of lands within an "estate" at the time of the passing of the Act. It also gave some security to non-occupancy ryots in the enjoyment of their lands. In other respects, generally speaking, it declared and gave statutory recognition to existing rights and status. One important feature of the Act is worthy of note: it throws into relief the component parts which, from immemorial times, go to constitute a village; *first*, the lands in the direct cultivation of the proprietor (called by various names); *second*, lands occupied by tenants or ryots; and *third*, old waste lands over which by custom the landlord possessed certain specific rights now crystallized in the statute. These remarks do not apply to ryotwari tracts in the direct possession of Government which are let out to *mirasidari* or hereditary ryots for purposes of cultivation.

The existence in a village of *pannai* lands in which the tenant cannot acquire occupancy rights except by contract, connote the existence of lands in which he can acquire such rights by prescription.

In the present case the grant itself does not convey in express terms the *kudivaram* to the grantee. Nor does the term Inam, an Arabic word meaning "a reward," give any indication of the intention of the donor, even if he had the right to bestow it on the donee. *Prima facie* a zemindar or polygar is a rent-receiver; or, to use

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the language of section 4 of Act I of 1903, he has the right to collect the rent from his tenants. *Prima facie*, his right of direct possession of the lands is confined to his "private lands" and the old waste land; it does not extend to "ryoti land."

The place of the cultivating ryots in the agricultural economy of Southern India is thus described in a Proceeding of the Board of Revenue of Fort St. George (Madras), dated 5th January, 1818.*

"The universally distinguishing character, as well as the chief privilege of this class of people, is their exclusive right to the hereditary possession and usufruct of the soil, so long as they render a certain portion of the produce of the land, in kind or money, as public revenue; and whether rendered in service, in money, or in kind, and whether paid to rajahs, jageerdars, zemindars, polygars, motahdars, shrotriendars, inamdars or Government officers, such as tahsildars, amildars, aumeens, or tanadars, the payments which have always been made by the ryot are universally termed and considered the dues of the Government."

It has been urged on behalf of the plaintiff that the onus was wrongly placed upon him, and in support of this contention the judgments of this Board, in *Suryanarayana and others v. Patanna and others* (1), and in *Upadrashtha Venkata Sastrulu v. Divi Seetharamudu and others* (2) were relied upon.

In the first case the grant appears to have been made somewhere in the fourteenth century of the Christian era, and it was conclusively proved, on behalf of the plaintiff, in that suit, that he and his predecessors had since then been in actual occupation of the lands, extending over centuries; they had further produced documents showing they had been actually cultivating the land. It was also established from the Inam Register that the grant not only included the revenue but also the soil. The Munsif had found on these facts in favour of the plaintiff, but his judgment was reversed by the District Judge, whose decree was affirmed on second appeal by the High Court. The Board upon a review of the facts established in the case declared that it could not under the above circumstances be assumed that the grant was only a grant of the king's share in the produce of the soil, and did not include the *kudivaram*. It was a presumption which was certainly not warranted by the facts of the case.

In the subsequent case of *Upadrashtha Venkata Sastrulu v. Divi Seetharamudu and others* (2) it was again found upon the evidence

* Mss. Copy of the India Office.

(1) (1918) L. R. 45-1. A. 209.

(2) (1919) L. R. 46-1. A. 123.

that the grant included the *kudiwaram*. Their Lordships say in their judgment delivered by Viscount Cave :—

“ There is not in any of the documents above referred to any trace of a claim by any person other than the inamdar to a permanent right of occupancy ; and the fact that by the terms of the grant the grantee is desired to cultivate the lands, and that he is referred to as residing in the village, tend to show that no such right existed in any other person.”

* * * * *

“ And when the subsequent history of the estate comes to be examined, it is found to be wholly inconsistent with the existence of any permanent occupancy rights. Tenancies have been continually granted by the inamdars for short periods and at variable rents. When tenancy lands were compulsorily acquired by Government and compensation was paid to the agramdar, no claim to compensation was put forward by the tenants. In the year 1904 all the tenants formally relinquished their lands to the plaintiff and put them in his possession, and from that date until tenancies were granted in the year 1907 the property remained vacant.”

In view of those facts the Board overruled the objection that the civil Court had no jurisdiction to entertain the suit, and that under the provisions of section 189 of the Act the revenue Courts only had the power to deal with the matter. In dealing with the judgments of the District Judge and of the High Court, their Lordships observed that the two appellate Courts in India had acted on a supposed presumption of law, that an Inam grant of a village, particularly if made to a Brahman, is *prima facie* a grant of the *melavaram* right only and does not include the *kudiwaram*, and they pointed out that in the previous case, already referred to, *Suryanarayana v. Patanna*. (1) it was held that no such presumption exists. And then they add :—

“ Each case must therefore be considered on its own facts ; and in order to ascertain the effect of the grant in the present case, resort must be had to the terms of the grant itself and to the whole circumstances as far as they can now be ascertained.”

The question came up again for consideration before the Board in the subsequent case of *Seturathnam Aiyar v. Venkatachala Gounden* (2) to which reference has been made before. That was a suit for ejectment by a mirasidar against the tenants in occupation of the lands in a village granted to him many years ago. As already

(1) (1918) L. R. 45 I. A. 209.

(2) (1919) L. R. 47 I. A. 76.

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observed, the mirasidar is himself a cultivating ryot, and the land which is granted to him is for purposes of cultivation in a ryotwari tract. The defendants contested the claim for ejectment, and alleged that they possessed occupancy rights. A considerable body of evidence was produced on both sides. The District Munsif dismissed the suits, holding that the defendants had established their prescriptive occupancy rights in the lands in their occupation and under their cultivation. The Munsif found that the plaintiff's claim to eject the defendants from the lands in actual cultivation was "barred," but decreed the claim in respect of the pasture land. The decree of the District Munsif was set aside by the District Judge, as he considered the question for consideration in the case was "whether the defendants had shown that the plaintiff or his predecessor-in-title had contracted the right of tenancy should be changed into a right of permanent occupancy." And his conclusion was that "in those circumstances I think it clear that the defendants have not established any contract on the part of the plaintiff or his predecessor-in-title to convey to them a right of permanent occupancy," and he had accordingly decreed the plaintiff's claim for possession of the suit lands.

On the appeal of the defendants, the High Court set aside the decision of the District Judge and remitted the case for a finding on the real point involved in the determination of the case. The learned Judges considered that the question which the District Judge had to consider was whether "on the admitted and undoubted facts of the cases, and the evidence on both sides, the defendants held the lands in their possession as tenants from year to year or as persons having a right of permanent occupancy."

On the return of his finding the learned Judges of the High Court found that he had omitted to consider the question that had been remitted to him. The following remarks are pertinent to the present case. The learned Judges observed :—

"The District Judge in his order submitting his findings had, notwithstanding the caution given by the High Court, again assumed that the defendants' original right was that of tenants from year to year, and that it lay on them to prove an express or implied contract by which the right of tenancy from year to year was changed into a right of permanent occupancy."

Without, however, remitting the matter for a proper finding, the High Court proceeded themselves to determine, upon the evidence on the record, the issue. To use the words of Sir Lawrence Jenkins, who delivered the judgment of the Board :—

"If and so far as this was an issue of fact—a point on which it is not necessary to express a definite opinion in the circumstances of this case—the Court had power to deal with it under section 103 of the Civil Procedure Code, 1908."

The conclusion of the High Court was that the defendants had established occupancy rights in the land they held; and this Board affirmed its decree.

It will be noticed that neither in the case of *Suryanarayana and others v. Patanna and others* (1), nor in *Seturatnam Aiyar and others v. Venkatachala Gounden and others*, (2) is there a suggestion of a presumption in favour of the inamdar or pattadar on the one side or of the ryot on the other. It was further distinctly pointed out in *Upadrashta Venkata Sastrulu v. Divi Seetharamudu and others* (3) that—

"Each case must, therefore, be considered on its own facts; and in order to ascertain the effect of the grant in the present case [that is the case with which the Board was dealing] resort must be had to the terms of the grant itself and to the whole circumstances so far as they can now be ascertained."

A Full Bench of the Madras High Court, however, has in a recent case, *Muthu Goundan v. Perumal Iyen* (4) held that underlying the exposition of their Lordships such an initial presumption is to be inferred. Their Lordships cannot help observing that in drawing this inference the learned Judges are clearly in error. Each case must be dealt with upon its own facts, with special regard to the evidence and circumstances therein.

When the entire evidence on both sides is once before the Court the debate as to onus is purely academical. On this point they desire to associate themselves with the observation of the Board in *Seturatnam Aiyar and others v. Venkatachala Gounden and others* (2): "The controversy had passed the stage at which discussion as to the burden of proof was pertinent; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them."

Dealing now with the facts of the present case, there is first the grant in favour of the plaintiff-appellant, the terms of which have already been set out. It does not in express terms grant to the inamdar both rights, *melavaram* and *kudivaram*. It speaks of other villages held by the grantor which, it might be inferred from the

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(1) (1918) L. R. 45 I. A. 209.

(2) (1919) L. R. 47 I. A. 76.

(3) (1919) L. R. 46 I. A. 123.

(4) (1920) I. L. R. 44 Mad. 588 (F. B.).

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document, were occupied by tenants, nor does it expressly say that only the *melavaram* right was granted to the donee. The defendants contended that they had been from time immemorial in possession of their holdings. They alleged they had been transferring their holdings, whole or in part, from time to time; that the lands had descended to their heirs in succession, and the descendants of the transferees were in possession; that they had partitioned the holdings amongst themselves; that they had made improvements, sunk wells and erected buildings thereon for husbandry and dwelling purposes, and had received compensation when any portion of their holdings were taken by Government for public purposes. Under these circumstances it became essential to have the evidence on both sides in support of the propositions they advanced, and to draw therefrom the right inference. Both sides, as already stated, produced a volume of evidence. The District Munsif considered it in the most exhaustive manner. He found that the village that had been granted to the plaintiff covered three classes of lands; one was in his own possession and cultivation, another was waste or pasturage, and the third was in the occupation of tenants. He found also that the plaintiff had for a number of years been fabricating evidence to defeat the rights of the tenants, and had in the course of the trial suppressed material evidence. He found, further, that the defendants had fully established their contentions that they had been in possession and occupation from before 1829 at least; they had dealt with those lands as occupancy ryots, partitioning their holdings, transferring and mortgaging them with the knowledge and acquiescence of the plaintiff and his agents; and that they had, in fact, received compensation for lands taken up by Government for part of their holding which had been acquired for public purposes. From these facts and circumstances he drew the inference that the defendants had fully established their prescriptive rights of occupancy, and accordingly dismissed the suits by the plaintiff. His conclusion amounts to this, that, assuming that the onus was on the defendants, they had fully discharged it.

The officiating Judge, Mr. Thornton, on appeal was apparently bewildered by the volume of decided cases, often inconsistent with each other, of his own High Court, and, therefore, unable to come to a definite conclusion on the facts as established by evidence; he accordingly dealt with the appeals, principally on the basis of onus and presumption.

A part of his judgment in suit No. 676 (Appeal No. 139 of 1908) throws light on some of the salient facts of the case,—

"9. I do not think the mere circumstance that the plaintiff admittedly enjoys both *warams* in the whole of the wet land considering the very small proportion this bears to land under cultivation in the village, is by any means a conclusive argument in his favour. A proprietor almost invariably has some *pannai* land, and there is no reason why in the case of the plaint village the wet land granted to the plaint *Mutt* should have not been the zemindar's *pannai* at the time of the grant. The village consists of 255 *cawnies* of which 22 *cawnies* are *poramboke* and 55 *cawnies* waste, and even including the land for which *muchilikas* have been executed on the terms of a year to year tenancy, the plaintiff is not shown to have both *warams* in more than about 70 *cawnies* of the cultivable lands. As the District Munsif points out, the plaintiff's predecessor in title cannot have obtained greater rights from the zemindar in respect of the tenants who were in possession at the time of the copper-plate grant than he enjoyed himself, and it is not suggested the Turayur zemindar owned both *warams* in other villages in his *semin*, nor is there anything to show that he was entitled to greater rights in the plaint village than in other villages. Nor can the existence of *muchilikas* for about 16 *cawnies*, of which 4 *cawnies* are described in the plaintiff's *adangal* (Exhibit VII) as *Mattam Sontham*, offer any evidence as to plaintiff's rights in other lands in the village. The *muchilikas*, Exhibit N series, are almost all dated after 1893, and little value can attach to documents which came into existence long after the dispute about occupancy right had arisen.

"10. I do not think the defendants can properly be described as *purakutudis*, as contemplated in XI Madras page 77, for both in the present case and in the connected cases, with the exception of the tenant who cultivates the land included in the registers of Uppiliapuram village, the tenants are all residents of the neighbouring village of Koppampatti, of which the plaint village is shown to form part in the Settlement Register of 1896 (Exhibit XAI). Again, though the rates of rent may be higher in the plaint village than in neighbouring villages, now it is clear from Exhibit B (1)—the Inam Register of 1864—that the rates were fixed at the average rate prevailing in the neighbouring villages, and I agree with the District Munsif in thinking plaintiff can derive but little support from Exhibits E, J, and H. Lastly, with regard to the land taken up by Government for the road: though the plaintiff received the full value of 96 *kulis* under Exhibit K, it is doubtful whether Exhibit K (1), which comprises the much large extent of 2 acres 78 *kulis*, relates to both *warams*. The recital in the document is that compensation is

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settled at Rs. 100 on account of income and *tirwa* lost to the plaintiff, and it is suggested by the plaintiff's vakil that the expression income and *tirwa* should be construed to mean both the *Kudivaram* and *Melvaram*. But I see no reason why this should not have been more definitely expressed had it been intended to award compensation for both *warams*, and the expressions used may, as urged by the defendant's vakil, be construed with equal fairness to mean that compensation was paid only for the *Melvaram*. I do not consider the plaintiff has established he is entitled to both *warams* in all the cultivated lands in the village, and as he has not proved what the terms of the tenancy are under which the defendants have cultivated the plaint land, I dismiss the appeal with costs throughout."

In his consideration of the Exhibits O 1, O 2 and O 3, which he differing from the Munsif, considered to be genuine, he gave little attention to the reasons the lower Court had assigned for considering them to be fabricated. In these circumstances the High Court deemed it necessary to call upon the officiating District Judge to record another finding on the evidence. The case had to go back twice for the purpose, and in the result Mr. Thornton expressed himself unable to come to any definite conclusion. The High Court were compelled to send down the case again, and it was then taken up by the permanent incumbent, who came to a definite conclusion upon the evidence of the record, and that finding has been affirmed by the High Court.

The case has now been before three Courts in India, and all the Courts have come to the conclusion upon a full consideration of the evidence and all the circumstances that the plaintiff does not possess the *kudivaram* which he claimed against the defendants, in respect of the lands in their occupation. The defendants have shown conclusively how they have been dealing with the property for at least a hundred years. They have also shown (and the Munsif has dealt with the subject most exhaustively) that they had received compensation from the Government for lands taken out of their holdings for public purposes. The plaintiff's evidence has been found to be mostly false or fabricated. In this view of the case their Lordships do not consider it necessary to express any opinion as to whether Act I of 1908 applied to rights in litigation at the time of the passing of the Act. The defendants clearly acquired their occupancy rights by prescription long before the statute came into force.

Under these circumstances their Lordships think that the con-

clusion of the High Court is correct, and that these consolidated appeals should be dismissed. In accordance with the terms under which special leave to appeal was granted, the appellant will pay the respondents' costs as between solicitor and client. Their Lordships will therefore humbly advise His Majesty accordingly.

Douglas Grant:—Solicitor for Appellant.

Chapman, Walker Shephard:—Solicitors for Respondents.

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Appeal dismissed.

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PRESENT—*Lord Buckmaster, Sir John Edge, Sir Lawrence Jenkins,*
and *Lord Salvesen.*

PIRTHIPAL SINGH

v.

GANESH DIN SINGH AND ANOTHER.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
OF OUDH].

Declaratory decree—Recognition of different rights—Long lapse of time—Effect.

In a settlement made in 1867 the right of the respondents was recorded as that of *thekeadar* without having either proprietary or under-proprietary rights in mouza Kusehti in the appellant's estate of Surajpur.

In 1868 a decree was passed between the parties to the same effect. In spite of this declaratory decree, the respondents claimed *pukhtadari* or under-proprietary right in some proceedings in 1887 to which the appellant's predecessor was a party and the claim was allowed. Again when the original settlement ended about 1897, a new settlement was made on the footing that the respondents' predecessors were under-proprietors. Further the Court of Wards, on behalf of the then taluqdar, sued the respondents for rent as *pukhtadars*:

Held, that, in spite of the decree of 1868, a title so long recognised cannot be defeated.

Appeal from a decree of the Court of the Judicial Commissioner of Oudh, reversing a decree of the Subordinate Judge of Bara Banki.

The appellant taluqdar of Surajpur estate brought the present suit for a declaration that the respondents were not under-proprietors of mauza Kusehti. The trial Judge decreed the suit but on

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appeal the Court of the Judicial Commissioner set aside the decree and dismissed the appellant's suit. Hence the appeal by the plaintiff.

The facts are fully set out in their Lordships' judgment.

De Gruyther K. C. and *Dube* for the Appellant: The appellant had it established from 1867 that the respondents were not under-proprietors but lessees at Rs. 1200 a year for the period of regular settlement, i. e. 30 years. Being tenants they cannot deny their landlord's title and cannot acquire under-proprietary rights by prescription. The officer who made the last settlement had no jurisdiction to decide the question of title.

The Respondents were not represented.

The judgment of their Lordships was delivered by

October, 31.

Lord Buckmaster:—The appellant in this case is the taluqdar of the Surajpur Estate, and in this capacity he sued to obtain a declaration against the respondents that they had no proprietary or under-proprietary rights in a village known as Mauza Kusehti, which forms part of the estate. The Subordinate Judge, before whom the matter first came for hearing, decided in his favour; the Judicial Commissioners have reversed that decree and from the Judicial Commissioners this appeal is brought.

The difficulty arises in this way: In the settlement that was made in 1867 there is no doubt that the taluqdar of this estate was clothed with rights which excluded the predecessors of the defendants from claiming to have any greater interest in the village than that of *thekadars*; in other words, it excluded them from proprietary or under-proprietary rights. A dispute having arisen early with regard to their claims, a decree was passed on the 7th April, 1868, which declared that the rights possessed were *thekadari* and not *Pukhtadari* rights.

It must be remembered that it was not that decree that created or affected the rights; it was a decree which declared what they were, but it was undoubtedly binding between the parties and but for subsequent events would have been the clearest possible proof of the appellant's title. The subsequent events are very interesting. From that time until shortly before the institution of these proceedings everything that has taken place has been upon the footing that the defendants really possessed the rights which the appellant now says that they cannot enjoy. The *wajib-ul-arz*, the *khewat* and every public document relating to this estate to which the attention of their Lordships has been directed proceed upon

that footing. Further, it is found that in 1887 proceedings of rather a remarkable character were taken, in which this right once more came in dispute. What the exact character of those proceedings was it is not easy to determine, but it appears that a decree-holder was seeking to issue execution against the Rani Chhbraj Kuar, who is described as the wife of the taluqdar of Surajpur, the defendant judgment-debtor. At any rate, this makes plain that the taluqdar of Surajpur, the person who then held the exact estate that is now held by the appellant was himself the subject of proceedings from which the execution proceeded. The Rani, who may have succeeded to the estate in some capacity or other, appeared before the Court for the purpose of determining what her interests were, and in those proceedings the occupants claimed once more that they had under-proprietary rights and that claim was allowed.

It has been urged in both the Courts that there is nothing to show that the rajah or rani was in fact the predecessor of the present appellant, and that is true. This case is singularly destitute of any verbal evidence at all, but at least it is impossible to overlook the fact that the decree which is in evidence is one in which the character of the person attacked has the exact character of the person who is the present appellant. Their Lordships merely mention this because they think it may be that in both the Courts insufficient weight has been attached to those proceedings; but it is not upon those proceedings that they base the opinion that they have formed, and the advice that they will tender to His Majesty. Their view is this: That in spite of the decree, from 1869 down to the institution of these proceedings, there has never been any occasion on which the rights now claimed by the defendants have not been upheld. One of the most critical of these occasions was when the original settlement came to an end. It appears from the judgment of the Subordinate Judge that that must have happened somewhere about 1897, or possibly in 1898, but when that settlement ended once more the question as to the determination of what were to be the rights of the parties arose; the proceedings were public, and another settlement was effected upon the footing that the defendants' predecessors were under-proprietors. Further, following upon the settlement, proceedings were taken on behalf of the Court of Wards, on behalf of the then taluqdar, against these under-proprietors on the 2nd June, 1899, for the purpose of obtaining rent, and they are definitely sued there as *Pukhtadars*. In other words, it is plain that whatever may have been the original effect of the decree, from that time down till now this estate has been

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regulated upon the footing that the defendants possessed the rights that they claimed to enjoy.

Their Lordships think it unnecessary to examine more closely in detail the circumstances of the evidence furnished by the documents. They have been set out with great care and accuracy by the judgments of all the learned Judges before whom the case has been heard, and there is nothing which they desire to add. They think that a title so long recognised cannot now be overthrown, and for this reason they think that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Barrow, Rogers & Nevill : Solicitors for the Appellant.

K. V. L. N.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Rankin.

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BEHARI LAL BISWAS

v.

NASIMANNESSA BIBI.*

Rent—Monthly instalments—Agreement before enactments of sections 53 and 67 of the Bengal Tenancy Act (VIII of 1885)—Interest, how calculated—Valid tender—Bengal Tenancy Act, Sec. 55—Landlord, if bound to accept amount less than due to him—Tender of interest, not adequate—Part satisfaction—Proceedings under Patni Regulation (VIII of 1819), nature of—Proceedings against recorded but deceased putnidar—Sale, if valid.

There may be an agreement for payment of money rent in modification of the provision of four instalments : *Manohar v. Paresk* (1).

Where a contract to pay rent in monthly instalments and in default interest would be charged according to law, was made before sections 53 and 67 of the Bengal Tenancy Act, were enacted :

Held, that the interest at the rate of twelve and half per cent. per annum was to be calculated from the date of default.

*Appeal from Appellate Decree No. 2151 of 1920, against the decree of Babu Amrita Lal Mukerjee, District Judge of Nadia, dated the 20th July, 1920, affirming that of Babu Bipin Bihari Mukerjee, Munsif of Krishnagar, dated the 13th June, 1919.

(1) (1913) 18 C. L. J. 175.

A creditor is not bound to accept less than his whole debt, and there can be no valid tender of part of an entire and indivisible debt : *Dixon v. Clarke* (1) and another case. But there is nothing to prevent the creditor from accepting the amount tendered in part payment, and his doing so will not preclude him from afterwards claiming the residue of his account, provided that the debtor did not make it a condition of his tender that it be accepted in discharge of the whole : *Bowen v. Owen* (2).

Section 55 of the Bengal Tenancy Act does not abrogate the rule that a creditor cannot be compelled to accept any sum in part satisfaction of his dues. That section treats, not of tender but of appropriation.

Where the amount due as arrears of rent was tendered in full, but what was tendered as the full amount due on account of interest on rent, cesses and interest on cesses, was inadequate :

Held, that the landlord was competent to refuse the tender so made. That he was not bound to accept even the principal amount of rent, when the interest due thereon was not tendered in full : *Bamundoss v. Omeish* (3). The principal and interest constituted one individual and entire claim.

A tender must be unconditional, or, at all events, free from any condition to which the creditor may rightfully object.

Proceedings under the Patni Regulation, taken for the realisation of arrears of patni rent, are against the tenure, and the mere fact that in the application to the Collector, the zemindar mentions the name of a deceased putnidar, which stood on his books, does not make the sale held under the Regulation invalid : *Rajnarain v. Ananta Lal* (4).

It is incumbent on persons, who acquire an interest in a patni tenure by succession, to get themselves registered in the books of the landlord, under section 15 of the Bengal Tenancy Act. If they fail to take the necessary steps and at the same time make default in the payment of rent, they cannot very well be heard to assail the legality of a sale under the Patni Regulation on the ground that their names were not mentioned in the application to the Collector : *Durga v. Brindaban* (5), and *Khetter Mohan v. Pran Kristo* (6).

Appeal by the Plaintiff.

Suit for declaration that the sale held under the Patni Regulation was null and void.

The material facts appear from the judgment.

Babus Tarakeswar Pal Chaudhuri, Atul Chandra Gupta and Nirmal Chandra Chatterjee for the Appellant.

Babus Ram Chandra Mazumdar and Bijan Kumar Mukerjee for the Respondent.

C. A. V.

(1) (1848) 3 C. B. 365 ; 75 R. R. 747.

(2) (1847) 11 Q. B. 130 ; 75 R. R. 306.

(3) (1856) 6 M. L. A. 289.

(4) (1892) I. L. R. 19 Calc. 703.

(5) (1892) I. L. R. 19 Calc. 504.

(6) (1899) 3 C. W. N. 371.

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November, 14.

The judgment of the Court was delivered by

Mookerjee J.—The subject matter of this litigation is a Patni taluk created on the 31st December, 1844 by Maharaja Srischandra Deb of Nadia in favour of Kaligati Mookerjee. The interest of the zemindar is now held by Nasimannessa Bibi, the defendant in this suit, while the interest of the patnidar has, by devolution, vested in Majidunnessa Bibi. The plaintiff Behari Lal Biswas is a darpatnidar, who obtained possession of the patni in 1909, under the provisions of section 13 of the Patni Regulation, on payment of the dues of the then zemindar, and he has since then been in occupation in order to recover the amount advanced by him. On the 15th May, 1916, the patni taluk was brought to sale by the zemindar for realisation of arrears due and was purchased by the zemindar herself. On the 27th May, 1916, the plaintiff instituted the present suit for declaration that the sale was null and void, inasmuch as no arrears were due at that time. The Court of first instance dismissed the suit on the ground that rent was in arrears, and that decision has been affirmed by the District Judge on appeal. On the present appeal, the plaintiff has urged that there had been a valid tender of the sums due, which had been improperly refused by the landlord. The facts material for the determination of the question of law thus raised are really not in controversy and may be briefly recited at this stage.

On the 18th October, 1915, the plaintiff sent to the defendant a sum of Rs. 647-0-9, through the post office, by what is known as rent money-order. As under the rules of the postal department, the maximum amount which can be remitted by a single money order is Rs. 600, the amount mentioned was included in two money orders, one for Rs. 600, the other for Rs. 47-0-9. The money order for Rs. 600 stated that the amount was remitted as rent due on the patni for the six months from Baisak to Aswin, 1322. The money order for Rs. 47-0-9 stated that Rs. 10-8-0 was interest on rent in arrears, Rs 35-13-9 was road and public works cesses, and annas 11 was interest due on cesses. The money orders were tendered to the defendant by the postal peon and were refused. On the 22nd November, 1915, the plaintiff deposited the amount in Court under section 61 of the Bengal Tenancy Act. On the 6th April, 1916, the plaintiff sent to the defendant Rs. 654-2-0 by rent money order. There were two money orders as on the previous occasion, namely, one for Rs. 600 and the other for Rs. 54-2-0. The money order for Rs. 600 stated

that the amount remitted was rent due for six months from Kartik to Chait 1322. The money order for Rs. 54-2-0 stated that Rs. 17-4-3 was interest on rent in arrears, Rs. 35-13-9 was road and public works cesses, and annas 6 was interest on cesses. The money orders were taken to the defendant by the postal peon but were refused. On the 18th April, 1916, the plaintiff deposited the sum in Court under section 61 of the Bengal Tenancy Act. The question in controversy is, whether there was a valid tender on either or both of the occasions mentioned. The defendant urges that what was tendered on each occasion was really less than the amount actually due and did not constitute a valid tender.

The patni lease fixed the annual rent at Rs. 1,200, payable in twelve monthly instalments, namely, Rs. 50 in Baisakh, Rs. 50 in Jaistha, Rs. 50 in Asar, Rs. 100 in Sraban, Rs. 250 in Bhadra, Rs. 100 in Aswin, Rs. 100 in Kartik, Rs. 100 in Aghran, Rs. 200 in Pous, Rs. 100 in Magh, Rs. 60 in Falgun, and Rs. 40 in Chaitra. The lease contained a covenant that on default of payment of the instalments, the lessee would pay interest according to law. It was further provided that on default, the rights and interests of the lessee would be sold under Reg. VIII of 1819 in order that the arrears of rent with interest might be realised. It is plain from the terms of the lease that Rs. 600 was the aggregate amount of rent in arrears for the first half of the year ending in Aswin, and another sum of Rs. 600 the aggregate amount of rent in arrears for the second half of the year ending in Chait. Consequently, when on the 18th October, 1915, the plaintiff sent to the defendant the sum of Rs. 647-0-9 by rent money order, the rent in arrear was Rs. 600 as correctly stated in the first money order. The question in controversy is, whether Rs. 10-8-0 was the amount of interest due on rent in arrears, Rs. 35-13-9 the amount due on account of cesses, and annas eleven the amount due as interest on cesses in arrears. The Courts below have answered this question against the plaintiff. The three items require separate examination.

The patni lease, as already stated, provided that in the event of default in the payment of rent according to the prescribed instalments, the lessee would pay interest according to law. This clearly refers to the law that might prevail at the time when the default should be made and the liability to pay interest might accrue. Reg. XV of 1793, which was repealed by Act VIII of 1868, fixed the maximum rate of interest on money due at twelve per cent per annum, subject to the reservation that interest would be decreed at a lower rate if so stipulated between the parties. The Regulation

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further provided that the amount decreed as interest would not exceed the principal sum, and that compound interest would not be allowed on intermediate adjustment of accounts. These provisions were reproduced in Reg. XXXIV of 1803 which was repealed by Act XV of 1874. Reg. VIII of 1805, which was repealed by Act XIX of 1873, and Reg. XIV of 1805 which was repealed by Act XII of 1876, contained similar provisions, and their application was extended by Reg. XVII of 1806 which was repealed by Act IV of 1882. These were followed by Act XXXII of 1839 which authorised the Courts to allow interest, in certain specified cases, at a rate not exceeding the current rate of interest. Next came Act XXVIII of 1855 which repealed the Usury Laws. Under section 21 of Act X of 1859, (Bengal Rent Act), interest was made payable on arrears of rent at 12 per cent per annum from the date of each instalment; to a similar effect was the provision in section 21 of Act VIII of 1869 B. C.; and this was reproduced in section 67 of the Bengal Tenancy Act, 1885. The law was altered, however, by Act I of 1907 (B. C.) and Act I of 1908 (E. B. & A. C.), and interest was made payable on arrears of rent at twelve and half per centum per annum. Section 67 thus modified stands as follows:

"An arrear of rent shall bear simple interest at the rate of twelve and half per centum per annum from the expiration of that quarter of the agricultural year in which the instalment falls due, to the date of payment or of the institution of the suit, whichever date is earlier." This has to be read with section 53 which provides that "Subject to agreement or established usage, a money rent payable by a tenant shall be paid in four equal instalments, falling due on the last day of each quarter of the agricultural year." The introductory words of the section indicate that there may be an agreement in modification of the provision for four instalments: *Manohor v. Paresk* (1). The agreement for payment of rent in monthly instalments in the case before us, would, consequently, be operative, even if section 53 had been in force when the lease was granted. The appellant has contended that this raises the question, how is section 67 affected by section 53; in other words, how has interest to be calculated under section 67 when the instalments are not quarterly but monthly; and we have been pressed to hold that even when the rent is payable in monthly instalments, interest should be calculated on each instalment, not from the date when it falls due, but from the last day of the quarter in which it falls due. In support of this proposition, reliance has been placed upon the

decision of the Judicial Committee in *Hemanta Kumari v. Jagadindra* (1), which was explained in *Narendra v. Gora Chand* (2); and *Manohor v. Paresh* (3). We are of opinion that the contention thus broadly raised, need not be examined for the purposes of this case. Here the contract was made before sections 53 and 67 of the Bengal Tenancy Act were enacted. The agreement to pay rent in monthly instalments was valid when made, and its validity has not been affected by the retrospective operation of a subsequent legislative enactment. The contract further provided that, in default of payment of rent according to monthly instalments, interest would be paid according to law. The law has fixed the rate of interest at twelve and half per centum per annum. *Prima facie*, interest has to be calculated at this rate from the date of default, and this is what was ruled by the Judicial Committee in *Hemanta Kumari v. Jagadindra* (1). The decision of the Judicial Committee was in fact so interpreted in *Narendra v. Gora Chand* (2), and *Manohor v. Paresh* (3). We are accordingly of opinion that interest in the present case was payable on rent in arrear, calculated from the date of each instalment; and there is no controversy that the amount remitted on account of interest on rent in arrears was less than what was due according to this method of calculation. As regards the amount of cesses, there is no controversy that what was remitted was less than what was due. The valuation roll dated 28th June, 1914 makes it abundantly clear that the amount of cesses annually leviable had been enhanced by the revenue authorities. The amount remitted as interest on cesses was consequently also smaller than what was due. The position thus is that what was due as rent was transmitted, but what was remitted as the entire amount due on account of interest on rent, cesses, and interest on cesses, was less than what was legally due. This raises the question whether there was a valid tender. The concurrent answer of the Courts below in favour of the respondent has been challenged before us as based on principles erroneous in law.

It is well settled that a creditor is not bound to accept less than his whole debt, and there can be no valid tender of part of an entire and indivisible debt: *Dixon v. Clarke* (4); *James v. Vane* (5). But, though a tender of a smaller amount than that of which an indi-

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(1) (1894) 1 L. R. 22 Calc. 214; L. R. 22 I. A. 131.

(2) (1906) 1 L. R. 33 Calc. 683; 3 C. L. J. 391.

(3) (1913) 18 C. L. J. 175; 17 C. W. N. 820.

(4) (1848) 5 C. B. 365; 75 R. R. 747.

(5) (1860) 2 E. and E. 883; 119 R. R. 988.

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visible and entire claim consists, will be invalid as a tender, there is nothing to prevent the creditor from accepting the amount tendered in part payment, and his doing so will not preclude him from afterwards claiming the residue of his account, always provided that the debtor did not make it a condition of his tender that it be accepted in discharge of the whole: *Bowen v. Owen* (1). The import of the term "indivisible and entire claim," which is used in this connection, will be fully appreciated, when it is said that though there can be no valid tender of part of such a debt, yet where the debt is of a conglomerate nature, that is to say, where the components exhibit the character of distinct debts in themselves, a debtor may make a valid tender of any one of such several distinct debts, if at the time he makes the tender, he takes care to indicate the debt on account of which he makes the tender; but, if in making the tender, he fails to specify the particular one of the several debts to which he wishes the tender to apply, and the amount tendered by him is insufficient to cover all, it will not be good for any. Thus, tender of enough to pay one of several distinct items in a bill, if offered in satisfaction of the whole, will not be a good tender in respect of either; though if it were specifically applied by the debtor to that one item at the time of payment, it would be a good tender in regard to that item, in spite of its being a unit. With reference to this, Coltman, J., observed in *Hardingham v. Allen* (2): "In order that a tender of one portion of a combined claim may be effective as regards that one portion, it must be specifically applied to that portion of it, or it does not sustain the tender." In the case before us, the amount due as arrears of rent was tendered in full, but what was tendered as the full amount due on account of interest on rent, cesses, and interest on cesses, was inadequate. We feel no doubt that the landlord was competent to refuse the tender so made.

The landlord was not bound to accept even the principal amount of rent, when the interest due thereon was not tendered in full. This is supported by the decision of the Judicial Committee in *Baniundoss v. Omeish Chunder* (3), where it was ruled that if principal as well as interest thereon is due, all payments should be applied in the first instance to interest, and thereafter to principal, only in so far as those payments exceed the interest due. This was the rule recognised since 1809, in a long series of decisions of the Sudder Court, mentioned in the judgment of Bayley and Jack-

(1) (1847) 11 Q. B. 130; 75 R. R. 306.

(2) (1848) 5 C. B. 793; 75 R. R. 839.

(3) (1856) 6 M. I. A. 289.

son JJ., in *Lootf Ally v. Guneskur* (1), which was ultimately affirmed by the Judicial Committee in *Luchmeswar v. Lutfali* (2); see also *Lootf Ali v. Afzulunnessa* (3) which was reversed by the Judicial Committee in *Lutf Ali v. Afzulunnessa* (4). Again in *Venkatadri v. Parthasarathi* (5), Lord Buckmaster reiterated the same view and relied upon the statement by Rigby, L. J. in *Parr's Banking Co. v. Yates* (6) "Where both principal and interest are due, the sums paid on account must be applied first to interest; that rule, where it is applicable, is only common justice; to apply the sums paid to principal, where interest has accrued upon the debt and is not paid, would be depriving the creditor of the benefit to which he is entitled under the contract." The substance of the matter is that, as pointed out by Lord Buckmaster in *Muhammad Hafiz v. Muhammad Zachariah* (7), the cause of action, where principal and interest thereon are both due, is only one, so that if the creditor sues to recover only the interest, he cannot sue to recover the principal and subsequent interest in a second suit. The inference follows that in the present case the landlord was entitled to refuse the tender, because the principal and interest constituted one indivisible and entire claim, and the sum tendered was smaller than the amount really due. This is supported by the decision of the Judicial Committee in *Durga Prosad Singh v. Rajendra Narayan Bagchi* (8). In that case, there were tenders in respect of rent and interest upon arrears of rent, based on an erroneous assumption as to the amount of rent payable. The amount really payable turned out to be larger than the assumed figure. It was ruled that the amounts tendered were not good tenders, either as tenders of rent or of interest on arrears of rent, and were consequently ineffective.

We must further observe that the plaintiff not only tendered less than what was due but tendered the insufficient amount for acceptance in full satisfaction of the claim of the landlord. A tender, however, must be unconditional, or, at all events, free from any condition to which the creditor may rightfully object. The condition which the debtor is the most apt to impose is precisely the one which the law does not permit; the debtor has no right to insist that the creditor shall admit that no

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(1) (1853) Sevestre 834 a.

(2) (1871) 8 B. L. R. 110.

(3) (1865) 3 W. R. 113.

(4) (1871) 9 B. L. R. 348.

(5) (1921) L. R. 48 I. A. 150; I. L. R. 44 Mad. 570; 33 C. L. J. 447.

(6) (1898) 2 Q. B. 460.

(7) (1921) L. R. 49 I. A. 9; 35 C. L. J. 126.

(8) (1913) L. R. 40 I. A. 223; I. L. R. 41 Calc. 493; 19 C. L. J. 95.

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more is due than the sum tendered: *Bowen v. Owen* (1); see also *Huxham v. Smith* (2); *Evans v. Judkins* (3); *Griffiths v. Hodges* (4); *Cheminant v. Thornton* (5); *Strong v. Harvey* (6); *Finch v. Muller* (7). Whether a tender is in fact intended to be conditional or not, may give rise to refined controversies, as is clear from numerous cases in the books: *Mitchell v. King* (8); *Hough v. May* (9); *Sutton v. Hawkins* (10); *Hastings v. Thorley* (11); *Hemwood v. Oliver* (12); *Bull v. Parker* (13) *Bowen v. Owen* (1); *Jones v. Bridgman* (14). No such question, however, arises here, as it is not disputed that what was tendered was tendered as the full amount due and was intended to be accepted only in full satisfaction of the claim. From whatever point of view the question is approached, it thus follows that the tender was bad.

As the money tendered was not on account but was in full satisfaction of the dues, it is not necessary to consider, whether, even if the tender were expressly in part satisfaction of the claim, the landlord would be bound to accept it. We may add, however, that we did not feel impressed by the argument that section 55 of the Bengal Tenancy Act was intended to abrogate the ordinary rule, recognised in a long line of cases, such as, *Cotton v. Goodwin* (15); *Dixon v. Clarke* (16); *Chunder Caunt v. Jodoonath* (17); *Ram Kamalessuri v. Sukhan Singh* (18) and *Bechu Singh v. Bicharam Sahu* (19), namely, that a creditor cannot be compelled to accept any sum in part satisfaction of his dues. Section 55 appears to refer, not to the right of a debtor to make a part payment, but to the appropriation of a payment when accepted by the landlord, in other words, section 55 treats, not of tender but of appropriation. We must, accordingly, hold, in concurrence with the Courts below, that there was no valid tender on the first occasion and the subsequent deposit under section 61 of the Bengal Tenancy Act was equally

(1) (1847) 11 Q. B. 130; 75 R. R. 306.

(2) (1809) 2 Campbell 19; 11 R. R. 651.

(3) (1815) 4 Campbell 156.

(4) (1824) 1 C. & P. 419.

(5) (1825) 2 C. & P. 50.

(6) (1825) 3 Bing. 304.

(7) (1848) 5 C. B. 428; 75 R. R. 774.

(8) (1833) 6 C. & P. 237; 40 R. R. 810.

(9) (1836) 4 A & E. 954; 43 R. R. 530.

(10) (1838) 8 C. & P. 259.

(11) (1838) 8 C. & P. 573.

(12) (1841) 1 Q. B. 403.

(13) (1842) 21 Dowling N. S. 345.

(14) (1878) 39 L. T. 500.

(15) (1840) 7 M. & W. 147.

(16) (1848) 3 C. B. 365; 77 R. R. 747.

(17) (1878) 1 L. R. 3 Calc. 468; 1 C. L. R. 470.

(18) (1902) 7 C. W. N. 172.

(19) (1909) 10 C. L. J. 91 (98).

ineffectual. The tender on the second occasion, followed by a deposit in Court, is, for similar reasons, of no avail.

As a last resort, a faint attempt was made to invoke the aid of the principle, recognised in some judicial decisions, namely, that an unconditional tender of a sum which turns out in the end to be less than what is really due may be valid *pro tanto*, if there is a genuine dispute as to the amount due: *Bowen v. Owen* (1); *Reed v. Goldring* (2); *Eckstein v. Reynolds* (3); *Henwood v. Oliver* (4); *Bull v. Parker* (5); *Greenwood v. Sutcliffe* (6); *Haji Abdul v. Haji Noor* (7) and *Digambar v. Harendra* (8). This doctrine, even if it be assumed to have been left unaffected by the decision of the Judicial Committee in *Durga Prosad v. Rajendra Narayan* (9), is of no assistance to the appellant. In the first place, the tender was not unconditional; in the second place, there was no substantial ground for dispute; the amount had been miscalculated because it overlooked that interest was payable at twelve and a half instead of twelve per cent and that the amount of cess leviable had been enhanced by the revenue authorities. The inference is thus irresistible that arrears were due and that the landlord was within her rights when she took recourse to the provisions of Reg. VIII of 1819.

It has finally been urged that the sale was bad, because the proceedings under the Regulation were carried on against the previous patnidar who was dead and whose name still stood on the books of the landlord. In our opinion, there is no substance in this contention. As was pointed out by Tottenham, J., in *Rajnara-in v. Ananta Lal* (10), "proceedings under the Patni Regulation, taken for the realisation of arrears of patni rent, are not taken against persons at all, but against the tenure; and the zemindar is quite right in setting out in his petition and notices the name of the patni and the names of the patnidars as recorded in his books." This view was not dissented from by Petheram, C. J. and Ghose, J.; indeed, if a different view had been taken by them on this point, it would not have been necessary for them to examine the point which led to difference of opinion and consequent reference to a

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(1) (1847) 11 Q. B. 130; 75 R. R. 306.

(2) (1813) 2 M. & S. 86; 14 R. R. 594.

(3) (1837) 7 A. & E. 80; 45 R. R. 676.

(4) (1841) 1 Q. B. 409; 55 R. R. 290.

(5) (1843) 2 Dowling N. S. 345.

(6) (1822) 1 Ch. 1.

(7) (1891) 1 L. R. 16 Bom. 141.

(8) (1910) 11 C. L. J. 226 (234).

(9) (1913) L. R. 40 I. A. 223 (235); 1 L. R. 41 Calc. 493; 19 C. L. J. 95.

(10) (1892) 1 L. R. 19 Calc. 703 (717).

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third Judge. We are not unmindful that in *Golan Sattar v. Prodyat Kumar* (1), Chatterjee J., although conceding that the proceedings under the Regulation were taken against the patni tenure, did not feel inclined to hold that the tenure could be sold by taking proceedings against wrong persons. The question, however, did not actually arise for decision in that case. It may be noted that the Regulation does not contemplate service of notice upon the defaulter personally. The petition and notice mentioned in section 8 (2) are stuck up in some conspicuous part of the *Katchari* of the Collector. A similar notice is stuck up at the *sudder Katchari* of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual case, is sent to be similarly published at the *katchari* or at the principal town or village upon the land of the defaulter. The proceeding is thus throughout against the tenure, and the mere fact that in the application to the Collector, the zemindar mentions the names of one or two of the parties in possession, though not registered in his books, and omits to mention the names of others, does not in any way vitiate the sale or render the proceedings invalid: *Raghub Chunder v. Brojonath* (2); *Gyanada Kantho v. Bromomoyi* (3); *Saibesh Chandra v. Bonowari* (4). Patni taluks are made heritable by section 3 of Reg. VIII of 1819 and it is incumbent on persons, who acquire an interest in a patni tenure by succession, to get themselves registered in the books of the landlord, under section 15 of the Bengal Tenancy Act. If they fail to take the necessary steps and at the same time make default in the payment of rent, they cannot very well be heard to assail the legality of a sale under the Regulation on the ground that their names were not mentioned in the application to the Collector: *Durga v. Brindabun* (5); *Khetter Mohan v. Pran Kristo* (6).

We are of opinion that the Courts below have rightly dismissed the suit and that this appeal must be dismissed with costs. The cross-objection has not been pressed by the respondent and is dismissed without costs.

A. T. M.

Appeal dismissed: Cross-objection dismissed.

(1) (1919) 29 C. L. J. 481.

(3) (1899) I. L. R. 17 Calc. 162.

(5) (1892) I. L. R. 19 Calc. 504.

(2) (1870) 14 W. R. 489.

(4) (1909) 10 C. L. J. 453.

(6) (1899) 3 C. W. N. 371.

Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Cuming.

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January, 11, 12, 13,
16, 17, 18, 19.
February, 6, 7, 8, 9.
August, 29.

Hindu law—Migration of family—Presumption—Family usage developed into binding law, if and how can be changed—Partition—Test—Taluk property, donees of, if joint tenants—Judgment, if relevant—Evidence Act (I of 1872), Sec. 11—Evidence elucidating history and status of family.

A Hindu family, residing in a particular province of India, is presumed to be governed by the law of the place where it resides: *Ram Das v. Chandra* (1). This presumption is rebutted, where the family is shown to have migrated from one province to another; the presumption then arises that the family carried with it the laws and customs as to succession and family relation prevailing in the province from which it came: *Soorendronath v. Heeramonee* (2) and another case. After the rebuttal of the presumption, the burden shifts and the other side has to prove that the family, after migration, has adopted the law and usages of the place to which it has migrated: *Govind v. Radha Kristo* (3) and other cases.

Hindu law is not merely a local law, but is essentially personal law, an integral factor of the status of every family which is governed by it. In its new domicile the family may, by the reflex action of manners and customs prevalent in resident families, consciously or unconsciously, modify its own governing rules; there may thus be an acceptance of a new law, not due to sudden change by choice or agreement, but by the gradual evolution of a family usage: *Tara Chand v. Reeb Ram* (4) and another case. When a new family usage has thus grown up in the course of generations, possibly with the concurrence or acquiescence of families of the same group, it furnishes the governing law of the family: *Rutheputty v. Rajunder* (5) and other cases. Where a family usage has thus developed into a binding law, it may be superseded by the growth of a contrary usage or by legislative enactment: *Hamerton v. Honey* (6). It is not open to a member at any time to disclaim his personal law and adopt another at his choice.

Instances of exclusion are of value, only if there is proof of demand and refusal.

The true test of partition of property is the intention of the members of the family to become separate owners. Consequently, there may be partition, even

*Appeals from Original Decrees Nos. 192 to 194 of 1919, against the decrees of Babu Bepin Chandra Chatterjee, Subordinate Judge of Jessore, dated the 5th April 1917.

(1) (1892) I. L. R. 20 Calc. 409.

(2) (1868) 12 M. I. A. 81; 1 B. L. R. P. C. 26; 10 W. R. P. C. 35.

(3) (1909) I. L. R. 31 All 477. (4) (1866) 3 Mad. H. C. R. 50 (54).

(5) (1839) 2 M. I. A. 133. (6) (1876) 24 W. R. (Eng). 603.

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though there be no actual division by metes and bounds: *Appovier v. Rama Subba* (1).

Property given by grandfather to his grandsons as *Yatuk* or affectionate gift, does not make the donees joint tenants with right of survivorship.

Though the recitals in the judgment cannot be used as evidence, still the judgment is evidence as a relevant fact in issue or as a transaction.

Evidence adduced to elucidate the history and status of what has been called connected families, where a family is one of a group, may be admitted under section 11 of the Evidence Act: *Nakes v. Satrughan* (2).

Appeals by the Defendant.

Suits for possession.

The material facts appear from the judgment.

Babus Sarat Chandra Rai Chowdhuri, Gunada Charan Sen and Anilendra Nath Rai Chaudhuri for the Appellant.

Dr. Dwarka Nath Mitter, Babus Mritunjay Chatterjee, Pramattha Nath Banerjee and Rama Prosad Mookerjee for the Respondents.

C. A. V.

The judgment of the Court was delivered by

August. 29.

Mookerjee J:—The subject-matter of each of the three litigations, which have culminated in these appeals, formed part of the estate of one Tara Prasanna Roy, brother of the appellant Sarada Prasanna Roy. Tara Prasanna made a testamentary disposition of his properties on the 3rd July, 1914, and died on the 3rd October, 1914. He left a widow, Trilok Mohini Debi, who executed three conveyances on the 13th September, 1915, 25th April, 1916, and 12th July, 1916 in favour of Manmohan Pande, and dealt with the estate left by her husband on the footing that she was under the will absolutely entitled thereto. The three conveyances constitute the foundation of the title set up by the plaintiffs. They alleged that the first defendant Sarada Prasanna had unlawfully kept them out of possession of the properties vested in them by virtue of the conveyances. The defendant resisted the claim on a variety of grounds which need not be enumerated in detail for our present purpose. It is sufficient to mention two of the defences which were unsuccessfully urged in the Court below and have been reiterated in this Court, namely, first, that Tara Prasanna was governed by the Mitakshara law and was not competent to make a testamentary disposition of his estate which was held jointly by him with his

(1) (1866) 11 M. I. A. 75; 8 W. R. P. C. 1.

(2) (1902) L. R. 29 I. A. 62 (67); 1 L. R. 29 Calc. 343.

brother and upon his death passed to him by survivorship; and, secondly, that in respect of a property called Rautara, the brothers obtained it as a testamentary gift from their paternal grandfather and held it as joint tenants with right of survivorship. The Subordinate Judge has overruled these contentions and decreed the suits. Upon the first point, he has found, first, that Tara Prasanna was governed by the Dayabhaga law and was competent to make a testamentary disposition in favour of his wife; and, secondly, that even if he were held to be governed by the Mitakshara law, he could make such disposition, as he was not joint with his brother. Upon the second point, the Subordinate Judge has found that, in respect of Rautara, the brothers were not joint tenants with right of survivorship. On the present appeal, the questions mentioned have been argued with great elaboration, and our attention has been drawn to all the relevant materials on the record. We have minutely considered the evidence, inspite of the obvious imperfections of the paper book, and we shall now state our conclusions with the reasons therefor.

The first question we have to take up for consideration, is, whether Tara Prasanna was governed by the Dayabhaga or the Mitakshara law. He was resident in Bengal, and consequently we start with the initial presumption that he was governed by the Dayabhaga law; for it is well settled that a Hindu family, residing in a particular province of India, is presumed to be governed by the law of the place where it resides: *Ram Das v. Chandra* (1). This presumption is rebutted, where the family is shown to have migrated from one province to another; the presumption then arises that the family carried with it the laws and customs as to succession and family relation prevailing in the province from which it came: *Soorendronath v. Heeramonee* (2); *Parbati Kumari v. Jagadis Chandra* (3). In the case before us, the existence of a tradition has been established by evidence, that in the time of Pratapaditya, that is, towards the end of the sixteenth century, this family, together with several others, migrated to Bengal from a place in the North-West Provinces where the Mitakshara law, as modified in the Mithila School, prevailed. Consequently, the initial presumption is displaced, and the presumption arises that Tara Prasanna was governed by the Mitakshara law, using that expression, for the sake of brevity, as indicating for the purposes of this case, the Mitakshara law as

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(1) (1892) I. L. R. 20 Calc. 409.

(2) (1868) 12 M. I. A. 81; 1 B. I. R. P. C. 26; 10 W. R. P. C. 35.

(3) (1902) L. R. 29 I. A. 82; 1 R. 29 Calc. 433.

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modified in the Mithila School. The burden thus shifts, and now lies upon the plaintiffs to prove that the family, after migration, has adopted the law and usages of the place to which it has migrated : *Govind Chandra v. Radha Krishto* (1) ; *Jagannath v. Narayan* (2) ; *Mailuthi v. Subbaraya* (3) ; *Kulada Prasad v. Haripada* (4).

The genealogical table, marked "A" and annexed herewith, shows the ancestry of Tara Prasanna Roy and his brother Sarada Prasanna Roy. They are descended from Raghunath Roy, who had two sons Kartick Chandra and Radha Mohan. Chandrasekhar, one of the sons of Radha Mohan, was the paternal grandfather of the appellant and his brother. On the 13th October, 1863, Chandrasekhar instituted a suit for establishment of title to the estate of his maternal uncle, Totaram, who had died in 1825, leaving a widow Subhadra who succeeded to her husband's estate and died in 1851. The genealogical table of the family of the mother of Chandrasekhar is marked B (1), and is annexed herewith. In the litigation commenced by Chandrasekhar, the question arose, whether the deceased and his nephew were governed by the Dayabhaga law or by the Mitakshara law. Chandrasekhar asserted that the Dayabhaga law had been adopted by the families, and his contention was upheld. The judgment delivered by Bayley and Sambhunath Pundit, JJ, in that suit on the 20th February, 1865, has found its way into the reports and is regarded as a leading authority on the subject of change of personal law by migration : *Chundro Sheekhur v. Nobin Soondur* (5). Reference is made in that decision to an earlier judgment in a litigation commenced by Obhoychurn, the son of the daughter of Baidyanath, brother of the very Totaram who was the maternal uncle of Chandrasekhar. The decision in the suit by Obhoychurn was pronounced on the 30th December, 1862 by Raikes, Seton-Karr, and Jackson, JJ, and has also found its way into the reports : *Ootum v. Obhoychurn* (6). In the suit by Obhoychurn, an opinion had been expressed that the evidence did not establish that the family of Totaram had abandoned the Mithila law in favour of the Dayabhaga law : Bayley and Pandit, JJ. considered the grounds for this view, and held, on the fuller materials produced before them, that the Dayabhaga law governed the parties. There is one passage in the judgment which may usefully be recalled here :*

(1) (1909) I. L. R. 31 All. 477.

(2) (1910) I. L. R. 34 Bom. 553.

(3) (1901) I. L. R. 24 Mad. 650.

(4) (1912) I. L. R. 40 Calc. 407 (416) ; 16 C. L. J. 311.

(5) (1865) 2 W. R. 197.

(6) (1862) W. R F. B. Rul. 67 ; 2 Hay. 534.

* See 2 W. R. pp. 202, 203—Rep.

"The plaintiff has clearly shewn by the evidence of kins and relatives, that in the family of the parties before the Court, in several cases where succession, according to the Bengal Law, was to go to one, and according to the school of Mitakshara to another, the succession was according to the former or Bengal School. It is proved that the ancestors of these parties migrated into this country about twelve or thirteen generations ago, with a few of their own priests. It is quite natural that some among them may still have for their priests descendants of the original family priests ; as the descendants of these priests cannot find it convenient to attend upon and accompany all the numerous descendants of the original emigrants scattered by degrees in different places from time to time, to many of the later generations, it is only left to accept the Bengalee priests available. Thus, too, the descendants of the family priests by degrees, after a few generations, acquiesce in performing the external ceremonies (or kria) according to the Bengal School. In such cases the Nagree character is abandoned for Sanskrit writing after 5 or 6 generations ; old habits and customs fall one by one ; and the priests and their jujmans both gradually become Bengalees in every sense. In this state and change for a long time, even after a complete conversion, the priests and their jujmans remain in theory a separate class, though for all other practical purposes, either of ceremonies, or of succession, they have long adopted the Bengalee School of the Hindoo Law.

"Such emigrants may become Bengalees in their ceremonies, but cannot and would not be allowed to intermarry with Bengalees of their own class. The fact, therefore, of want of proof of intermarriage with Bengalees, or the fact of some families of the descendants of these original emigrants having still for their priests some of the descendants of the priests that had accompanied their ancestors, does not afford proof in support of the fact of the original laws and customs being still observed by these people as a class and tribe. The witnesses for the plaintiff distinctly state that the necessary rites in the families of both the parties are now performed according to the Bengalee School ; and, what is more important, they distinctly swear to the fact that within their knowledge succession is guided by the same school. The evidence given by the defendant to counteract this case of the plaintiff is the deposition of two witnesses who are not of the family or of the tribe to which both the parties belong, and who distinctly admit that they are ignorant of the school of the Hindoo Law under which succession is guided in the family. It is to be borne in mind that the fact of some

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members of the family having Bengalee priests is by itself a strong proof of all having adopted Bengalee ceremonies for all essential ceremonies, though it is admitted that these persons of different branches of the original family intermarry only among themselves. It is clear that generally there can be no intermarriage between two classes of people who perform their essential rites, such as marriages, funerals, tonsure, &c. under two different schools of Hindoo Law. When these people are found to have lived here so long as to have by degrees adopted the language, the dress (particularly for women), and the ordinary food for the people of Bengal—the two last of which are materially different in the two countries among such people, when all intercourse and intermarriage with the parent-country has long ceased—it is nothing surprising that they should be proved, as deposed to by competent witnesses, to have by degrees been compelled to abandon their old forms of ceremonies now impracticable, and what is of more importance of having, whenever such a contingency arose that one more nearly allied was not the heir by their old Law, allowed him or her to succeed according to the Laws of Bengal.

“The cases of succession quoted by the witnesses of plaintiff do not, as to the rights of the daughter’s son, shew sufficiently clear proof of the statement of the plaintiff with regard to the application of the Law of Bengal as these witnesses were not made to state that, when such succession took place to the deceased, he was a member of a joint family. There cannot, however, be any mistake regarding the succession of a sister’s son. He has no right to succeed except under the Law of the Bengal School. (This was understood to be the law before the decision of the Judicial Committee in *Griidhari v. Bengal Government* (1) and of the Full Bench in *Amrita v. Lakhi* (2), which explained away the contrary decision of the Judicial Committee in *Thakoorain v. Mohan* (3). It is important that more than two instances of such succession were pointed out by the witnesses. The defendant has not contradicted the fact, or proved that, in any other similar cases of succession, any other rule of succession was adopted. The instances given by the witnesses took place in the class to which both the parties belong, and the statement of the plaintiff is corroborated by the fact of Soobhadra’s undisputed succession in that very branch of the family of which Tota and his brother were the members. Some attempt was made to raise doubts regarding

(1) (1868) 12 M. I. A. 448 ; 1 B. L. R. P. C. 44 ; 10 W. R. P. C. 31.

(2) (1868) 2 B. L. R. F. B. 28.

(3) (1867) 11 M. I. A. 386 ; 7 W. R. P. C. 25.

the correctness of the claim of the plaintiff, on the ground that he asserted wrong facts in the case, and did not venture to bring his claim for more than 10 years after the death of Soobhadra, and that he had pleaded otherwise in the other case brought against Nobeen. But in the face of such clear proof of the law of succession applicable to the family as now found by evidence, we cannot attach any importance to this objection. It is not at all surprising to find that plaintiff at first entertained doubts regarding his ultimate success, and so delayed to sue for that or other reasons.*

These observations may be taken along with the apt comment of Babu Kishen Kishor Ghose, who argued on behalf of the respondent in the case of *Ootum v. Obhoy* (1), that families situated like that of the defendant commonly use the customs of Bengal for everyday purposes and produce the law of Mithila for their law suits. The weight of the decision in *Chundro Sheekhur v. Nobin* (2), was fully realised by the legal advisers of the defendant, and an endeavour was accordingly made to minimise its effect by the contention that it is at best a decision merely that the family of the maternal uncle of Chandra Sekhar was governed by the Dayabhaga law. In support of this position, reference has been made to a passage in the judgment of O'Kinealy and Hill, JJ., in the case of *Parbati Kumari v. Jagadis* (3), which was ultimately affirmed by the Judicial Committee, and, which, it was suggested, indicated the possibility of marriages between the members of two families, one governed by the Dayabhaga, the other governed by the Mitakshara. We need not consider, whether, even if permissible, this is probable; the fact remains that in the suit of Chandra Sekhar, no such distinction was made between the families of his paternal and maternal ancestors. The judgment of the High Court makes it abundantly clear that evidence was adduced to prove that both the families had abandoned the Mitakshara in favour of the Dayabhaga, and this evidence was accepted by this Court as reliable. It may be observed parenthetically that the contrary view might lead to unforeseen complications. The principle of mutuality applies in the determination of the question of heirship between a maternal uncle and his nephew, and if one of them were governed by the Mitakshara and the other by the Dayabhaga, the result would be very different from what would be the case if both were governed by the Dayabhaga. The appellant has contended that the recitals and findings in the judgment of this Court in the suit of Chandra Sekhar do not con-

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(1) (1862) W. R. F. B. Rul. 67 (69).

(2) (1865) 1 W. R. 197.

(3) (1902) I. L. R. 29 Calc. 433 (440).

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clude him; the answer is that the respondents do not rely upon the judgment for such purpose. Assume for the moment that the principle recognised in *Kashi Nath v Jagat Kishore* (1), and *Tripurana v. Rokkan* (2) applies, and the recitals in the judgment cannot be used as evidence; still, the judgment is evidence as a relevant fact in issue or as a transaction. The judgment so used shows that the question was raised and decided, whether the families of the paternal and maternal ancestors of Chandra Sekhar were or were not governed by the Dayabhaga law. The evidence then accessible to the Court is no longer available, partly, by reason of lapse of time, partly from destruction of portions of the record in accordance with statutory rules. There can, in our opinion, be no room for doubt as to the propriety of the course adopted by the Subordinate Judge, when he attached great weight to the circumstance that, in 1865, this Court found that the Dayabhaga law had been adopted in the families of the paternal and maternal ancestors of Chandra Sekhar.

It is not a matter for surprise that Chandra Sekhar, who had successfully asserted that the families of his paternal and maternal ancestors had adopted the Dayabhaga law, should have consistently adhered to that position, which had secured for him the estate of his maternal uncle after the death of his maternal aunt. On the 29th January, 1864, while his suit against Nabinsundar was still pending in the Court of the Principal Sadar Amin of Jessore, he made a testamentary disposition of his properties. The terms of the will, which has been produced before us, leave no room for doubt that the testator made the disposition on the footing that he was subject to the Dayabhaga law and had absolute dominion over his properties, ancestral as well as self-acquired. Chandra Sekhar died in 1868, and his estate was disposed of as directed by him. Many years after his death, on the 23rd February, 1876, an ekarnama was executed between his sons Hari Prasanna and Mahendra Nath on the one hand, and the descendants of his brother Gobinda Chandra and cousin Kali Kishore on the other. The document was in essence a deed of partition amongst members of the family, and proceeded on the assumption that the testamentary disposition by Chandra Sekhar was valid and operative. Along with this, we must remember that the brick-built house of Chandra Sekhar at Krishnagar was sold by Hari Prasanna and Mahendra Nath, long after Sarada Prasanna had grown into manhood; this is consistent only with the theory that Hari Prasanna and Mahendra Nath considered that

(1) 19 51 23 C. L. J. 543; 20 C. W. N. 643.

(2) (1922) 42 M. L. J. 324.

they were competent to deal in this manner with ancestral property, as in reality they would be under the Dayabhaga law. We find, again, that on the 8th July, 1886, Hari Prasanna and Mahendra Nath executed a deed of gift in favour of Panchanan the son of their sister Joytara; the subject-matter of the gift was the property obtained by their father Chandra Sekhar as the result of his suit against Nabinsundar already mentioned. This cannot be reconciled with the theory that the family was governed by the Mitakshara law. We find next that, on the 7th September, 1895, Hari Prasanna made a testamentary disposition of his estate. The will recognises the validity of the disposition by Chandra Sekhar and proceeds to give directions consistent with the Dayabhaga and inconsistent with the Mitakshara. There is really no room for doubt that Hari Prasanna, like his father Chandra Sekhar, acted throughout on the assumption that the family was governed by the Dayabhaga law. Hari Prasanna died on the 1st December, 1895, and, then, for the first time, Sarada Prasanna made an attempt to set up the theory that the family was still governed by the Mitakshara law. Hari Prasanna had left by his second wife, two sons, namely, Sarada Prasanna and Tara Prasanna and, by his fourth wife six sons, namely, Guru Prasanna, Jyoti Prasanna, Jagat Prasanna, Lal Gopal, Jay Gopal and Bijay Gopal, the last four of whom were minors. There can be little doubt that Sarada Prasanna took full advantage of the situation, created disputes, and, on the 22nd December, 1895, just three weeks after his father's death, secured a reference to arbitration. Here, for the first time, we find an assertion that the members of the family were "up country Brahmins and governed by the Mitakshara law," coupled with an allegation that Hari Prasanna the father of the executants, "out of misapprehension used to consider the paternal properties and the other properties acquired by the proceeds thereof as his self-acquired properties." We need not discuss what weight should be attached to a statement of this character by a person who had passed the prime of life and had never ventured to set up such a case so long as his father was alive. But we note that the arbitration was carried out with uncommon rapidity; in the course of three days, on the 25th December, 1895, the arbitrators made their award which was made a rule of Court on the 10th February, 1896. The Subordinate Judge has held that this was engineered by the appellant, with a view to nullify the testamentary disposition made by his father. That would be an obvious and immediate advantage; but foundation would also be laid for a remote benefit; as Tara Prasanna was childless, Sarada Prasanna would be entitled to claim his

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interest by survivorship, if the family were held to be governed by the Mitakshara. In this connection, it cannot be ignored that he was an experienced member of the legal profession, while his brother and his step-brothers, four of whom were minors, were not familiar with the devious paths of law and lawyers. It is desirable to add that we are not now concerned with the validity of the settlement; the transaction is relevant, only upon the question, whether the family was governed by the Dayabhaga or the Mitakshara. Upon that point, as the Subordinate Judge has held, it is relatively of little consequence, when contrasted with the lifelong and self-consistent conduct of Chandra Sekhar and Hari Prasanna. We pass on now to the conduct of Tara Prasanna himself. On the 3rd July, 1914, he made a testamentary disposition of his properties, and gave directions consistent with the Dayabhaga and inconsistent with the Mitakshara. We need not, however, attach much weight to this fact, as this is the very disposition which has led up to the present litigations. There is no room for dispute that the conduct of the immediate ancestors of the appellant cannot be reconciled with the theory that the family was governed by the Mitakshara law. But our attention has been drawn to three instances of succession in the family, which, it is alleged, do not support the position that the Dayabhaga law is applicable. On examination, however, each of these turns out to be of an inconclusive character. Kalikanand survived his father Gobinda Chandra for less than a month (A). After his death, his widow Katyaini contended herself with an allowance and resided, as is not uncommon, in her paternal residence. The income of her husband's share was very small and the amount paid as maintenance might have been regarded as an adequate substitute. Instances of exclusion are of value, only if there is proof of demand and refusal. The widow of Girijanand, another son of Gobinda Chandra, was excluded from inheritance by the will of her husband, which is said to have contained a provision for her maintenance, and she committed suicide within two or three years after she had become a widow (A). Nanibala, the widow of Saileswar, was a minor at the date of the present suit, and she had time yet to enforce her right of succession (A). On the other hand, there are instances of the grant of succession certificate and guardianship certificate, such as is inconsistent with the theory of the existence of a joint family governed by the Mitakshara law: *Beejraj v. Bhyro-persaud* (1); *Bissen v. Chatrapat* (2); *Gharibulla v. Khalak*

(1) (1896) I. L. R. 23. Calc. 912.

(2) (1895) I. C. W. N. 32.

Singh (1); this happened in fact, with regard to the estates of Mahendra Nath and Hari Prasanna after their demise (A).

The conclusion, thus drawn by the Subordinate Judge from instances of succession in the family, has been fortified by him by reference to evidence of the observance of rites and ceremonies at marriages, births and deaths which indicate the relinquishment of Mitakshara law and the adoption of the Dayabhaga law in the family. The value of such evidence was emphasised by the Sudder Court in *Raychunder v. Gocool* (2) and by the Judicial Committee in *Parbati Kumari v. Jagadis Chandra* (3), but it was perhaps not fully appreciated in *Huro Pershad v. Shibo Shunkuree* (4). The evidence on this part of the case is conflicting, but the Subordinate Judge has come to the conclusion that the balance of testimony is in favour of the plaintiffs. There is some indication that Sarada Prasad, since the death of his father in 1895, has endeavoured to conform to the Mitakshara rather than to the Dayabhaga; the evidence shows his scholarly attainments in Sanskrit and his acquaintance with authoritative works of both the schools. The evidence at the same time shows, however, that the officiating priests have not much of learning, and one of them, in the stress of cross-examination, made the astonishing statement that his knowledge of Smriti of Mithila was derived from Raghunandan (the authoritative exponent of the Bengal School of Hindu Law). The evidence further shows that the Maithili priests employed perform the puja in the same manner as Bengali priests. The inference is legitimate that the priests, like the members of the family, have adopted the Bengal system of rights and ceremonies, even though they were themselves Maithili in origin. The sradh ceremony is performed according to the system prevalent in Bengal; while the attempt to prove that the *sapindikaran* ceremony, in an exceptional case, was performed according to the Mithila school on the twelfth day and not according to the Bengal school on the thirteenth day, completely broke down, when the fact was brought out in evidence that it was in fact performed on the anniversary of the day of death. Much stress was laid on the performance of the Tilak ceremony prior to marriage; but it cannot be overlooked that it has a singular resemblance to what is known as the *asirbad* ceremony in Bengal. In our opinion, the Subordinate Judge has correctly held that as

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(1) (1903) L. R. 30 I. A. 165; I. L. R. 25 All. 407.

(2) (1801) 1 Mac. Sel. Rep. 43 (56).

(3) (1902) I. L. R. 29 Calc. 433.

(4) (1870) 13 W. R. 47.

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regards language, dress, food and rites and ceremonies, the members of the family have adopted the style prevalent in Bengal. This, indeed, was fully established more than half a century ago in the suit brought by Chandra Sekhar for recovery of the estate of his maternal uncle; this is manifested in the passage from the judgment of Bayley and Pandit, JJ set out above.

We cannot leave this part of the case without some reference to the evidence which has been adduced to elucidate the history and status of what has been called connected families. Such evidence, where a family is one of a group, may be admitted under section 11 of the Indian Evidence Act, which lays down that facts not otherwise relevant are relevant, if, by themselves or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable; see *Mahes Chandra v. Satrugan* (1), where Lord Macnaghten pointed out that the rule of the custom of lineal primogeniture obtained in all the Dalbhoom families, though some of them were governed by the Mitakshara, others by the Dayabhaga, notwithstanding that there were intermarriages between them; see also *Shimbu Nath v. Gaya Chand* (2); *Hurnabh v. Mundil* (3). In the case before us, it is not necessary for the plaintiffs to establish that every one of the families which belong to the group that migrated towards the end of the sixteenth century, has abandoned the Mitakshara in favour of the Dayabhaga; the fact that some of them have done so may lend additional support to the allegations of the plaintiff, and can be used only to supplement direct evidence, for we cannot prove the unknown by doubtful or hypothetical analogies. One of the families mentioned is that of the Missirs of Samta (B. 2); a daughter of Mahendra married into that family, while two daughters of that family married Durgananda and Girijananda, the nephews of Chandra Sekhar. In a litigation relating to that family, the question arose, whether the Dayabhaga or the Mitakshara was the governing law: *Sonatum v. Ruttun* (4). Pandit, J., in remanding the case, referred to the decision in *Ootum v. Obhoy* (5), and after remand, it was held by the District Judge, Mr. Rivers Thomson, on the 28th July, 1864 that the family was governed by the Dayabhaga law. Again, in the case of the family

(1) (1902) L. R. 29 I. A. 62 (67); I. L. R. 29 Calc. 343.

(2) (1894) I. L. R. 16 All. 379.

(3) (1899) I. L. R. 27 Calc. 379 (386, 399).

(4) (1864) W. R. Gap. No. 95.

(5) (1862) W. R. F. B. Rul. 67; 2 Hay 534.

of the Chaudhuris of Panchpota (B. 7) it was held, on the 27th June, 1901, that the members were subject to the Dayabhaga and not the Mitakshara. The Subordinate Judge, Mr. Srigopal Chatterjee, pronounced an elaborate judgment and reviewed the result of litigations in connected families, including the suit of Chandra Sekhar previously mentioned. This judgment was affirmed by this Court on the 8th July, 1904, by Rampini and Mitra, JJ. Patitpaban Chaudhuri, the plaintiff in that case, who unsuccessfully urged that the family was governed by the Mitakshara, is a son-in-law of the appellant. In two subsequent suits, however, in 1905 and 1907, Patitpaban succeeded in securing a contrary verdict; but it is noticeable that the judgment of the High Court in the earlier suit was not produced in the first of these cases, while it was erroneously excluded from evidence in the second case. In the family of the Rays of Gangadharpore, it was found in 1915 that the members had adopted the Dayabhaga system; two of the daughters of the appellant have married into this family. Similar remarks apply to the Pradhan family of Samta (B. 3). In that family a succession certificate was taken out on the death of Pramatta by his mother Nistarani, such as is permissible only if the Dayabhaga applies. These Pradhans were the agnates of the maternal uncle of Chandra Sekhar; and a daughter of the appellant has married into that family, while a daughter of that family has married a son of Maendra, the paternal uncle of the appellant. We do not overlook, however, that the Pradhans of Pipe (B. 5), the Rays of Beria (B. 6) and the Rays of Jaharabad appear to have adhered to the Mitakshara. It also appears that the Misras of Chitra belong to the same category (B. 4); the mother of the appellant was a daughter of this family. We need not deal in detail with other families, which are very remotely connected, such as the family of the Rays of Lalola. In a litigation concerning the members of that family, the Mitakshara was assumed to be applicable in 1870: *Mooktakeshee v. Oomabuttty* (1); but the real question is, is there, was, whether the family was joint or separate. On a review of the entire evidence on this part of the case, we agree with the Subordinate Judge that the preponderance is distinctly in favour of the view maintained by the respondents. It is not necessary to decide, with regard to each of the individual families, whose case are not really before us for adjudication, whether they are governed by the Dayabhaga or the Mitakshara; it is sufficient to state that the impression left on our minds is that in the allied or connected families, the Dayabhaga has been

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very widely adopted, and the Bengal system of rites and ceremonies has been generally recognised. This renders it highly probable, within the meaning of section 11 of the Indian Evidence Act, that Tara Prasanna Ray, the grandson of Chandra Sekhar Ray, was governed by the Dayabhaga like his two immediate ancestors.

We have indicated above that the appellant, since the death of his father, has made an attempt to revert to the Mitakshara which had been abrogated in the family for generations. This may raise the interesting question, whether an individual member of a family, which has migrated and adopted the law of what may be called its new domicile, may, of his choice, revert any day to the law which governed the family in its original home. Neither authority nor principle has been invoked in favour of the possibility of such reversion, except by the growth of a new family usage. Were a Hindu family migrates from one province to another, the presumption is that it carries with it the laws and customs as to succession and family relations prevailing in the province from which it came: but this presumption may be rebutted by proof that the family has adopted the law and usages of the place to which it has migrated. The reason is that the Hindu law is not a merely local law, but is essentially personal law, an integral factor of the status of every family which is governed by it. In its new domicile, the family may, by the reflex action of manners and customs prevalent in resident families, consciously or unconsciously, modify its own governing rules; there may thus be an acceptance of a new law, not due to sudden change by choice or agreement, but by the gradual evolution of a family usage; see *Tara Chand v. Reeb Ram* (1); *Abraham v. Abraham* (2). When a new family usage has thus grown up in the course of generations, possibly with the concurrence or acquiescence of families of the same group, it furnishes the governing law of the family; see *Rutheputty v. Rajunder* (3); *Pudmapati v. Doolar Singh* (4); *Soorendronath v. Heeramonnee* (5); *Moh's v. Satrugshan* (6); *Parbati v. Jagadis* (7); *Abdurrahim v. Halimabai* (8); *Balwant v. Baji Rao* (9); *Rana*

(1) (1866) 13 Mad. H. C. R. 50 (54).

(2) (1863) 9 M. I. A. 195 (199, 244, 246); 1 W. R. P. C. 1.

(3) (1839) 2 M. I. A. 132.

(4) (1847) 4 M. I. A. 259; 7 W. R. P. C. 41.

(5) (1868) 12 M. I. A. 81; 1 B. L. R. P. C. 26; 10 W. R. P. C. 35.

(6) (1902) L. R. 29 I. A. 62; I. L. R. 29 Calc. 433.

(7) (1902) L. R. 29 I. A. 82; I. L. R. 29 Calc. 433.

(8) (1915) L. R. 43 I. A. 35.

(9) (1920) L. R. 47 I. A. 213; 25 C. W. N. 243.

Mahatab v. Badan Singh (1); *Kulada v. Haripada* (2); *Pitambar v. Nisikanta* (3). When a family usage has thus developed into a binding law, let it be conceded that it may be superseded, by the growth of a contrary usage, by legislative enactment: *Hamerton v. Honey* (4). But it would obviously lead to much confusion and abundant litigation, if the law permitted arbitrary attempts to revive and give effect to the original usages, after they had been clearly abandoned, and the abandonment had been acted upon so long as to result in the adoption of new usages. The view cannot consequently be maintained that it is open to a member at any time to disclaim his personal law and adopt another at his choice; if this were permissible, chaos would be the only result; it is not necessary to discuss here whether a family custom can be put an end to by the consensus of opinion of all the members, or of the majority of the family: *Mahomed v. Haji Ahmed* (5); *Rajishen v. Ramjoy* (6); *Sarabjit v. Indarjit* (7); *Ayyankutti v. Krishna* (8). In the case before us, there is no evidence of discontinuity of the personal law adopted by the family in the course of generations and the growth of a new family usage, constituting its supersession and a reverter to the personal law of the family in its original domicile.

The second question we have to take up for consideration is, whether the appellant and his brother were joint or separate in estate. The Subordinate Judge has answered the question against the appellant. We are of opinion that this conclusion cannot be successfully assailed. The award of the 25th December, 1895, clearly effected a severance of interest amongst the eight sons left by Hari Prasanna Ray. The award was made pursuant to the eknamna of the 22nd December, 1895, and was transformed into a decree of Court on the 10th February, 1896. The contention that the arbitrators acted in excess of their authority is futile. The division they effected was within the scope of their authority; but if they really exceeded their powers, the appellant should have objected when his step brothers enforced the award under sections 525 and 526 of the Code of Civil Procedure, 1882. There was then not only

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(1) (1921) L. R. 48 I. A. 446; 26 C. W. N. 226.

(2) (1912) I. L. R. 40 Calc. 407; 16 C. L. J. 311.

(3) (1910) 31 C. L. J. 52; 24 C. W. N. 250.

(4) (1876) 24 W. R. (Eng.) 603.

(5) 1885 I. L. R. 10 Bom. 1 (13).

(6) (1872) I. L. R. 1 Calc. 186; 19 W. R. 8.

(7) 1904 I. L. R. 27 All. 203.

(8) (1922) I. L. R. 45 Mad. 394 (407).

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no opposition on the part of the appellant, the decree was in fact made with his consent, and it cannot now be impeached as irregularly or improperly obtained. The Subordinate Judge has further held, on the oral and documentary evidence, that the decree based on the award has been carried into effect. The appellant did not thereafter live with his brother or step-brothers as members of a joint family. The income has been separately enjoyed, in defined shares, though the properties may not all have been partitioned by metes and bounds. The evidence has been placed before us, and has been minutely commented upon. We see no reason to doubt that the Subordinate Judge has correctly estimated the effect of the evidence on this part of the case. There is no room for controversy that according to the principle enunciated by the Judicial Committee in a long series of decisions, a severance was effected in this case; and there is neither allegation nor proof of a subsequent reunion. As stated by Lord Westbury in *Appoier v. Rama Subba* (1), the true test of partition of property is the intention of the members of the family to become separate owners. Consequently, there may be partition even though there be no actual division by metes and bounds. This has been repeatedly reaffirmed; see *Bulabaksh v. Kukhm. Bai* (2); *Rakisen v. Ramnarayan* (3); distinguished in *Durga v. Bul. akur d* (4); *Parbati v. Nannihal* (5); *Su. aj Narain v. Ekbal Narain* (6); *Girija Bai v. Sadasib* (7); *Kawal v. Parbhu* (8); *Nageswar v. Ganisha* (9); *Sura bairi v. Seokumar* (10), *Lakshman v. Kamchindru* (11); *Muait v. Rungla* (12); *Ajoahya v. Mub. d o* (13); *Anand Kisore v. Daiji* (14); *Rojaratna v. Anji* (15); *P. Linianmul v. Muihu Venkutu* (6).

The third question, which requires examination is, whether the appellant and his brother were, in respect of the property known as

(1) (1866) 11 M. L. A. 75; 8 W. R. P. C. L.

(2) (1913) L. R. 30 I. A. 130; 1 L. R. 10 Calc. 75.

(3) (1903) L. R. 10 I. A. 139; 1 L. R. 30 Calc. 78.

(4) (1906) 1 L. R. 9 All. 93.

(5) (1904) 1 L. R. 36 I. A. 71; 1 L. R. 31 All. 412; 10 C. L. J. 121.

(6) (1912) 1 L. R. 40 I. A. 40; 1 L. R. 35 All. 80; 17 C. L. J. 188.

(7) (1916) L. R. 43 I. A. 151; 1 L. R. 43 Calc. 103; 24 C. L. J. 207.

(8) (1917) L. R. 44 I. A. 159; 1 L. R. 39 All. 496; 26 C. L. J. 101.

(9) (1919) L. R. 47 I. A. 57; 1 L. R. 42 All. 363.

(10) (1879) L. R. 6 I. A. 88; 1 L. R. 5 Calc. 148.

(11) (1880) L. R. 7 I. A. 181; 1 L. R. 5 Bom. 48.

(12) (1902) 1 L. R. 29 Calc. 707.

(13) (1909) 14 C. W. N. 221.

(14) (1913) 31 C. L. J. 216.

(15) (1911) 10 Mad. L. T. 529.

(16) (1917) 33 Mad. L. J. 759.

Rautara, joint tenants with right of survivorship. The Subordinate Judge has answered this question against the appellant. He is clearly right as to the true construction of the will of Chandra Sekhar. The property was given by Chandra Sekhar to his grandsons, Sarada Prasanna and Tara Prasanna, as Yatak or affectionate gift. This could not make the donees joint tenants with right of survivorship. We need refer only to the decision of the Judicial Committee in *Jageswar v. Ramchand* (1), where Lord Watson expressed his disapproval of the importation of an extremely technical rule of English conveyancing, because, first, the principle of joint tenancy is unknown to Hindu Law apart from the Mitakshara doctrine of survivorship, and, secondly, even according to the law of England, a conveyance, or an agreement to convey his or her personal interest by one of the joint tenants operates as a severance. Reference may also be made to the text *सहचरः पश्चात्तु संयुक्तः सन्तु* *सहचरः*; and also to the decisions in *Rewun Persad v. Radha Beeby* (2); *Nurooji v. Ferribis* (3); *Bai Dinoli v. Late* (4); *Kishori v. Alunara* (5); *Har Prasad v. Sukhdevi* (6); *Karuppi v. Sankara* (7); *Chakku v. Kunhu* (8); *Bhubu v. Leary* (9). We hold accordingly that the interest of Tara Prasanna in Rautara did not pass by survivorship to the appellant, independently of the question, whether the parties are governed by the Dayabhaga or the Mitakshara.

After the most careful consideration of all the materials on the record, we see no escape from the conclusion that the Subordinate Judge has rightly decreed the suits and that the appeals must be dismissed with costs.

A T M.

Appeals dismissed.

(1) (1861) L. R. 23 I. A. 44; I. L. R. 23 Calc. 670.

(2) (1861) 4 M. I. A. 137.

(3) (1898) I. L. R. 21 Bom. 80.

(4) (1902) I. L. R. 26 Bom. 445.

(5) (1911) I. L. R. 33 All. 665.

(6) (1951) I. L. R. 37 All. 241.

(7) (1903) I. L. R. 27 Mad. 300.

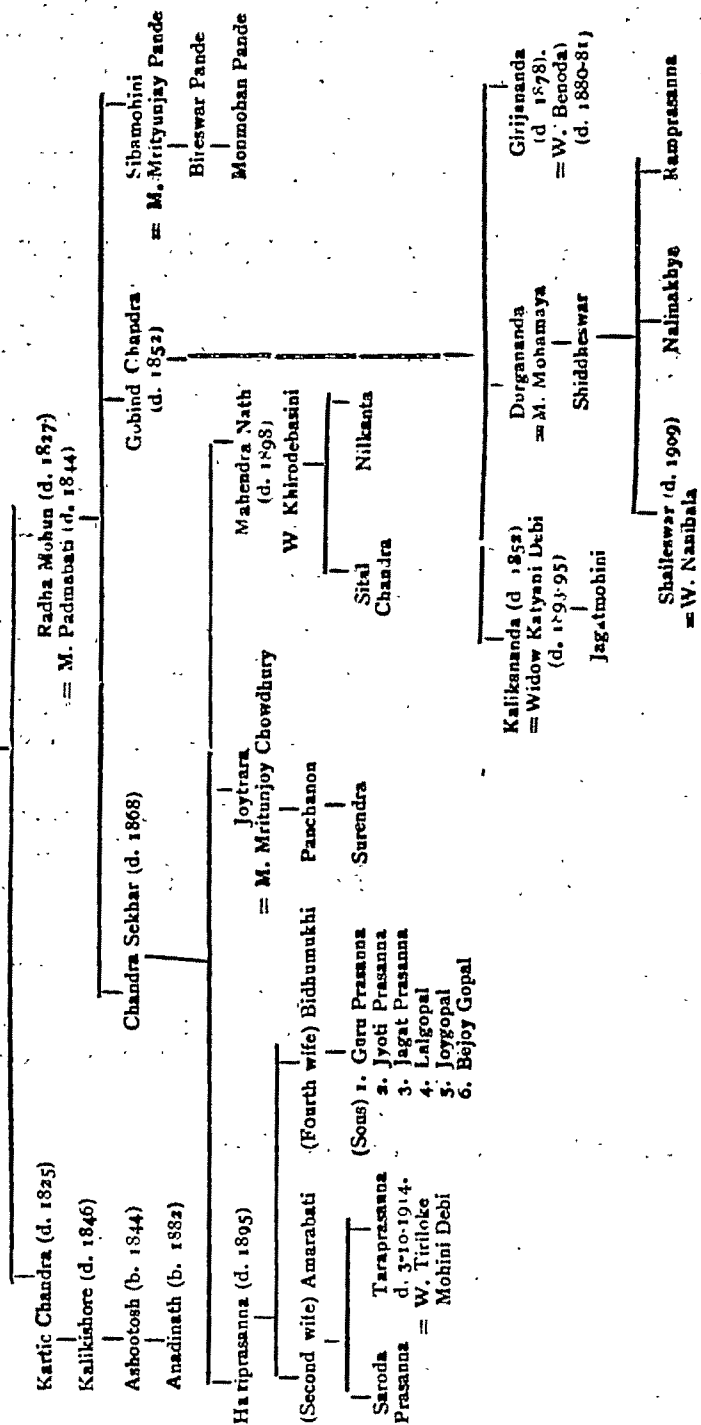
(8) (1903) I. L. R. 30 Mad. 317.

(9) (1877) I. L. R. 24 Calc. 64; C. W. N. 578.

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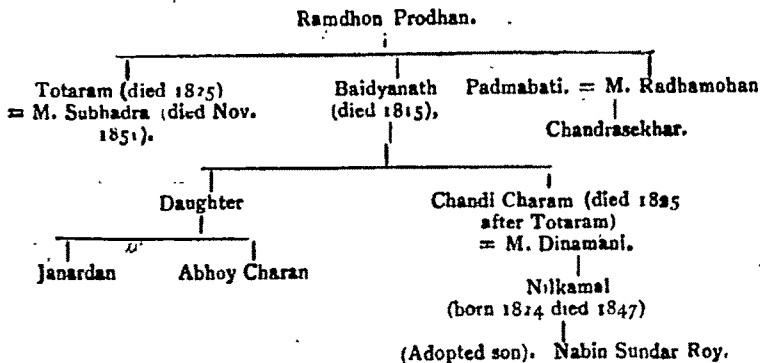
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B. (1).

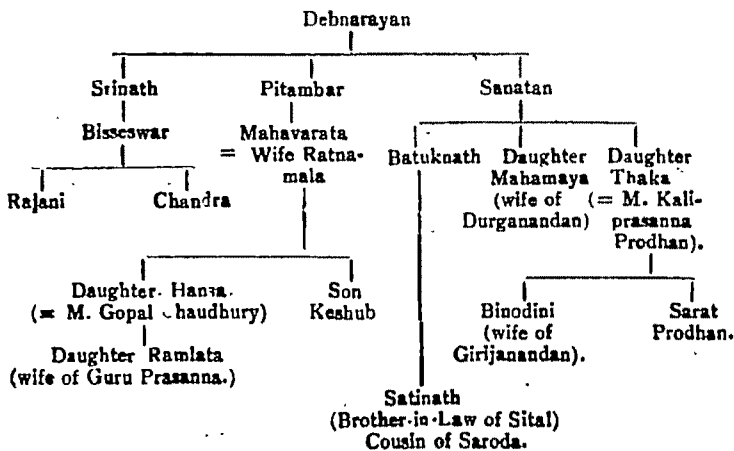
Family of Chandrasekhar.



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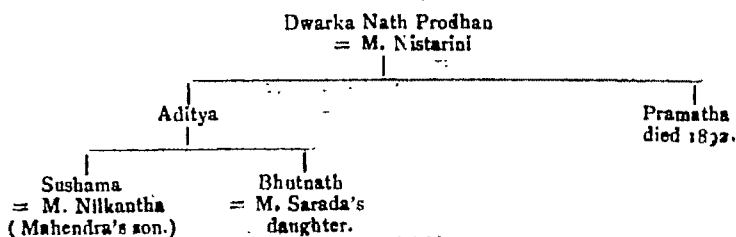
B (2).

Misra family of Samta.



B (3).

Prodhan Family of Samta.



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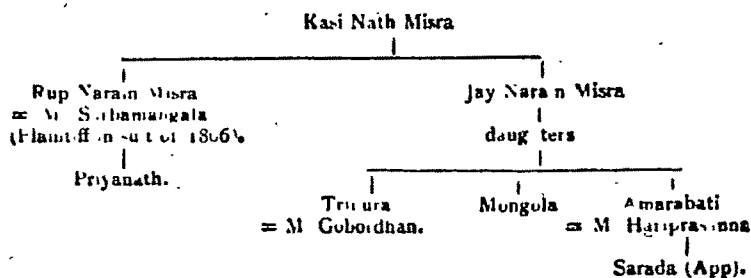
v.

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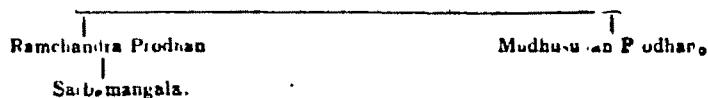
B 4.

Misra family of Chatra.



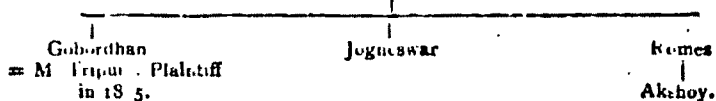
B 5.

Prodhan Family of Pipelee.



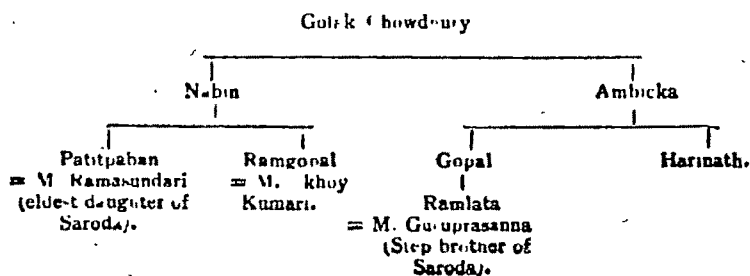
B. 6.

Roy Family of Beria.



B. 7.

Chowdhury family of Panchpota.



CRIMINAL REVISION.

Before Mr. Justice Newbould, and Mr. Justice Sukrawardy.

FAZAR PRAMANIK

v.

KING-EMPEROR.*

CRIMINAL.

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November, 23.

Acquittal—Criminal Procedure Code (Act V of 1898), Secs. 247, 403—Revival of proceedings under different charge on the same facts.

The petitioner was originally summoned to answer a charge under section 426 I. P. C. He was acquitted under section 247 of the Code of Criminal Procedure on the ground of the absence of the complainant. The complainant submitted a petition to the District Magistrate who revived the complaint but directed that prosecution should proceed under section 379 I. P. C. instead of under section 426. The petitioner was then convicted under section 379 I. P. C. :

Held, that the proceedings from the date of the revival of the case were vitiated by want of jurisdiction, as the acquittal by the Magistrate on the charge under section 426 I. P. C. was a bar to the petitioner being put on his trial again on the same facts which were relied on to support the charge under section 379 I. P. C.

Application for revision under section 435 of the Code of Criminal Procedure by the Accused.

Babu Dinesh Chandra Roy for the Petitioner.

The judgment of the Court was as follows :

In this case the petitioner was originally summoned to answer a charge under section 426 Indian Penal Code. During the pendency of that case the Magistrate acquitted him under section 247 Criminal Procedure Code on the ground of the absence of the complainant. The complainant submitted a petition to the District Magistrate who revived the complaint but directed that prosecution should proceed under section 379 Indian Penal Code instead of under section 426. In our opinion this order was beyond the jurisdiction of the Magistrate. Having regard to the provisions of section 403 Criminal Procedure Code the acquittal by the Magistrate on the charge under section 426 Indian Penal Code was a bar to the petitioner being put on his trial again on the same facts which were relied on to support the charge under section 379 Indian Penal Code. That being so we must hold that the proceedings from the date of the revival of

November, 23.

* Criminal Revision No. 859 of 1922, against the order of the District Magistrate of Pabna, dated the 14th August, 1922, directing retrial in the case of the petitioner, who was convicted by the Honorary Magistrate of Serajganj, dated the 6th June, 1922.

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 1922.
 Fazar
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 King-Emperor.

the case are vitiated by want of jurisdiction and we accordingly set aside the subsequent orders of the Bench of Magistrates of Serajgunje dated 6th June 1922 convicting the petitioner and of the District Magistrate of Pabna dated the 14th August 1922 directing a retrial of this petitioner. We make the Rule absolute. The fine if paid will be refunded.

A. T. M.

Rule made absolute : conviction set aside.

Before Mr. Justice Newbould, and Mr. Justice Suhrawardy.

CRIMINAL.
 1922.
 November, 23.

SHIB CHANDRA CHAKRAVARTY

v.

RABBANI MANDAL AND OTHERS.*

Compromise—Criminal Procedure Code (Act V of 1898), Sec. 345—Charge under sections 323 and 342 I. P. C. (Act XLV of 1860)—One of the complainants not a party.

The opposite party were charged under sections 323 and 342 I. P. C. In the first charge they were alleged to have caused hurt to A and in the second charge they were alleged to have wrongfully confined A and the petitioner. They were convicted on both these charges; they appealed. At the hearing of the appeal an application was made by A to compound the case under section 345 of the Code of Criminal Procedure. The Magistrate allowed the compromise and acquitted all the appellants in the appeal under that section:

Held, on the application of the petitioner, that as he was no party to the compromise, the order of acquittal so far as the offence committed against him was concerned, was illegal.

Application for revision under section 435 of the Code of Criminal Procedure by one of the Complainants.

Babus Dasarathi Sanyal, Manmatha Nath Mukherjee, Upendra Kumar Roy and Lalit Mohan Sanyal for the Petitioner.

Mr. Monier and Babu Sarat Chandra Mukherjee for the Opposite Party.

The judgment of the Court was as follows:

* Criminal Revision No. 731 of 1922, against the order of the District Magistrate of Jessore, dated the 26th June, 1922, reversing the order of the Sub-Deputy Magistrate of Bongaon, dated the 25th May, 1922.

Three persons who are the opposite parties before us were tried by Babu Surendra Nath Banerjee Magistrate 2nd class at Bongaon who framed charges against them for having committed offences punishable under sections 323 and 342 I. P. C. In the first charge they were alleged to have caused hurt to one Hari Nath Bose and in the second charge they were alleged to have wrongfully confined Hari Nath Bose and Shib Chandra Chakravarty. They were convicted on both these charges and they appealed to the District Magistrate. At the hearing of the appeal an application was made by Hari Nath Bose to compound the case under section 345 Criminal Procedure Code. The District Magistrate allowed the compromise and acquitted all the appellants under that section.

This Rule has been obtained by Shib Chandra Chakravarty on the ground that he was no party to the compromise and that therefore the acquittal so far as the offence committed against him was concerned was illegal. We hold that this Rule must be made absolute on this ground. Though Hari Nath Bose was the complainant in the case, that gave him no power to compound the offences under section 345 Criminal Procedure Code. Under that section the persons by whom an offence may be compounded are set out in the 3rd column of the statement which forms part of that section. Hari Nath Bose could compound the offences of hurt and wrongful confinement committed against him. But the only person who could compound the offence of wrongfully confining Shib Chandra Chakravarty was Shib Chandra Chakravarty himself. As he was no party to the compromise the acquittal of the accused on this part of the charge was illegal.

We accordingly make this Rule absolute. We set aside the order of acquittal so far as it relates to the conviction for the offence of wrongfully confining Shib Chandra Chakravarty. The appeal so far as it relates to this offence must be heard on the merits.

The three accused will appear before the Magistrate and execute fresh bail bonds for their appearance when called on.

A. T. M.

Rule made absolute.

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Shib Chandra

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Rabbanl.

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Before Mr. Justice Newbould, and Mr. Justice Sukrawardy.

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1922.

November, 22.

AKHOY MONDAL AND OTHERS

v.

BASU RAI AND OTHERS.*

Possession—Criminal Procedure Code (Act V of 1898), Sec. 145—Decree of civil Court, validity of, if can be questioned—Symbolical possession—Decree inter partes.

In a proceeding under section 145 of the Code of Criminal Procedure, the Magistrate cannot go behind the decision of the civil Court in the matter.

It is not for the Magistrate to question the validity of a decree that has not been set aside by a competent Court.

When the decree is *inter partes*, it is immaterial whether the delivery of possession is symbolical or not.

In this case, the Magistrate in disregarding the delivery of possession, acted with gross irregularity and in a manner that was likely to cause a failure of justice.

Application for revision under section 435 of the Code of Criminal Procedure by the Second Party.

Proceeding under section 145 of the Code of Criminal Procedure.

Babus Manmatha Nath Mukherjee and Harendra Kumar Sarbadhikary for the Petitioners.

Babu Narendra Kumar Bose for the Opposite Party No 1.

The judgment of the Court was as follows :

November, 22.

This Rule is directed against an order of the Sub-Divisional Magistrate of Bankura declaring the first party, the opposite party before us to be in possession of certain lands under section 145 Criminal Procedure Code. The Magistrate has based his order on the Record of Rights published in the settlement proceedings which recorded the possession of this party. But subsequent to the publication of this Record of Rights it appears that the second party who are the petitioners before us obtained a decree against the first party in the suit of the Subordinate Judge of Purulia and in execution of that decree they were put in possession of the disputed land. This Court has repeatedly held that in a proceeding under section 145 Criminal Procedure Code the Magistrate cannot go behind the decision of the civil Court in the matter. The Magistrate here has erred in thinking that the decree can be ignored

* Criminal Revision No. 787 of 1922, against the order of Babu S. Chatterjee, Sub-Divisional Magistrate of Bankura, dated the 8th August, 1922.

because the Subordinate Judge of Purulia had no jurisdiction over this land and because the delivery of possession was symbolical. It is not for the Magistrate to question the validity of a decree that has not been set aside by a competent Court. Also when the decree is *inter partes* it is immaterial whether the delivery of possession is symbolical or not. We hold that in this case in disregarding this delivery of possession the Magistrate acted with gross irregularity and in a manner that was likely to cause a failure of justice.

We accordingly make this Rule absolute and set aside the order of the Magistrate declaring the first party to be in possession.

A. T. M.

Rule made absolute.

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Akhoy

v.

Baru.

CIVIL REFERENCE.

Before Sir John George Woodroffe, Knight, Judge, Mr. Justice Greaves and Mr. Justice B. B. Ghose.

IMPERIAL TOBACCO COMPANY OF INDIA, LIMITED

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Assessment—Income tax—Company—Agent—Receipt of money—Indian Income Tax Act (VII of 1918), Secs 31, 34.

Six persons who were all residing out of British India were share-holders in the company. They were entitled to certain dividends for their shares in the company the profits of which accrued in British India. The profits due to those share-holders were sent to them by the company to their residence outside British India. The company was assessed for the super tax due on the incomes of those six share-holders as agent of the non-resident persons under the provisions of the Income Tax Act and the company had raised an objection that it could not be so assessed. The company stated in its letter to the Collector that on the declaration of a dividend the company was in the position of debtor to the share-holders :

Held, per Woodroffe and Greaves JJ. (B. B. Ghose J. contra), that the company was not, under the circumstances of the case, an agent for these persons.

Section 34 of the Indian Income tax merely defines who may be included as an agent under section 31 of the Act and hence the agent must be in receipt of income within the terms of section 31. Sections 31 and 34 of the Act should be read together.

* Reference under Sec. 31 (1) of the Income Tax Act. Suit No. 57 of 1921.

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Company of India.Secretary of State
for India in Council.

Per B. B. Ghose J.: The agent of a non-resident person need not be in receipt of the income on behalf of such person. The mere fact of agency is sufficient to make him liable to be assessed in respect of the income of the principal.

A person receiving income for another is an agent under the general law.

Section 34 of the Indian Income Tax Act should be read in connection with the preceding section rather than with section 31. Section 34 refers to cases where the non-resident person has no agent in British India appointed by himself and therefore it becomes necessary to find a person who should be "deemed to be an agent" only for the purpose of the Income Tax Act and that can be done by the Collector acting in accordance with the provisions of this section.

It is necessary that the person on whom the Collector has served a notice under section 34 is a "person employed by or on behalf of a person residing out of British India or having any business connection with such person," and if that condition is satisfied, the person on whom such notice has been served shall for the purposes of the income tax be deemed to be the agent of such person.

A company incorporated according to law, is an artificial legal person having an existence separate from its corporators. There is no legal impediment to a company being agent for any of its share-holders. The relation, however, of share-holder and company is not in itself the relation of principal and agent: *Salomon v. Salomon and Co.* (1) and *Daimler Co. Ltd. v. Continental Tyre and Co.* (2). Something more would be necessary in order to constitute a company an agent for its share-holder.

The Courts ought not to be influenced by any notion of hardship in exceptional or individual cases in interpreting a statute.

In order to prevent any case of hardship the proviso to section 34 of the Indian Income Tax Act has been enacted and the Collector may give effect to any reasonable objection before treating a person as agent under section 34.

Reference made by the Chief Revenue Authority under section 51 (1) of the Income Tax Act, on the application of the Assessee, The Imperial Tobacco Company of India, Limited.

The judgments of the Court were as follows:

February, 17.

Woodroffe J.:—In this case the applicant company has been assessed to super-tax as agent for six gentlemen mentioned in the Reference. All these gentlemen are non-residents of British India. They are share-holders in the company and the assessment has been made in regard to the dividends payable to them by the company. The company is an Indian Limited Company and the income of which assessment was made arose and accrued in British India. The question is whether the company is an agent for these gentlemen as defined in the Indian Income Tax Act VII of 1918. It is their contention that they are not such agents, and that they are not in any receipt of any income of the persons whose agents they are alleged to be.

(1) (1897) A. C. 22. (2) (1916) 2 A. C. 307 (338).

The Board has held that they were such agents and the matter has been referred to us upon the application of the company. One substantial question is whether sections 31 and 34 of the Indian Income Tax Act are to be read together or disjointly, in which latter case it would not be necessary in all cases that the agent should be in receipt of the income. On a consideration of this matter I am of opinion that section 34 merely defines who may be included as an agent under section 31. If so, the agent whether we look to section 31 or 34 must be in receipt of income within the terms of the former section.

I do not think that the circumstances of this case show a receipt within the terms of the section. Though this is sufficient to determine the matter I may add that I am not satisfied that even if sections 31 and 34 be read disjointly, the company was under the circumstances of this case an agent within the terms of the Act. The answer, therefore, to the first question, namely, whether the Collector of Income Tax is right in holding that the company is an agent for these share-holders, is answered in the negative. The second question namely, if so, whether the company has rightly been assessed to super-tax on their account, does not arise. A copy of this judgment is directed to be given to the revenue authority.

Greaves J.:—I agree.

B. B. Ghose J.:—I regret very much that I am unable to concur in the judgment just pronounced. I think it necessary that I should state as clearly as I am able the reasons for which I have arrived at a different conclusion.

This is a Reference made by the Chief Revenue Authority under section 51 (1) of the Income Tax Act, 1918, on the application of the Assessee, the Imperial Tobacco Company of India, Limited. Six persons who are all residing out of British India are share-holders in the company. They were entitled to certain dividends for their shares in the company the profits of which accrued in British India and there is no question that the share-holders are liable to pay super-tax on their income so derived. The profits due to those shareholders were sent to them by the company to their residence outside British India. The company was assessed for the super tax due on the incomes of those six share-holders as agent of the non-resident persons under the provisions of the Income Tax Act and the company has raised the objection that it cannot be so assessed. The questions on which the decision of this Court is sought are, (1) whether the Collector of Income Tax is right in holding that the company is agent for those share-holders under

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section 34, Act VII of 1918 and (2) if so whether the company has rightly been assessed to super tax on their account.

A company incorporated according to law is an artificial legal person having an existence separate from its corporators. There is therefore no legal impediment to a company being agent for any of its share-holders. The relation however of share-holder and company is not in itself the relation of principal and agent : *Salomon v. Salomon & Co.* (1); *Daimler Co. Ltd. v. Continental Tyre & Co.* (2). Something more would be necessary in order to constitute a company an agent for its share-holder. The contention on behalf of the company in this case is that it cannot be held to be agent of the non-resident share-holders so as to be liable to be assessed for income tax for those share-holders by the procedure taken by the Collector under section 34 of the Income Tax Act. It is urged that section 34 should be read along with section 31 and unless a person receives income on behalf of another residing out of British India he cannot be deemed to be an agent under section 34, and although the company has the income of those persons it is not in receipt of such income. Assuming that the company is not in receipt of the income, in order to see whether the company may be treated as agent the provisions of the Income Tax Act commencing from section 31 should be examined. Under section 31 an agent of any person residing out of British India being in receipt on behalf of such non-resident person of any income chargeable under the Act is held liable for the tax. If he is actually an agent and in receipt of income on behalf of the principal nothing more is necessary in order to render him liable, but the tax is to be levied upon and recoverable from him under section 31 irrespective of any other provision in any other section of the Act. It is not necessary in such a case for the Collector to give the agent so liable any notice under section 34 of his intention of treating him as agent of the non-resident person, because he is in fact the agent. Section 32 refers to the case where the income chargeable is received by the Court of Wards and certain other persons. This section has no direct bearing on the present question but it is noticeable that the income chargeable must be received by the Court of Wards or other persons in order that the tax may be levied upon them. Then comes section 33, sub-section (1) of which has an important bearing on the present question. Under this section any person residing out of British India whose income accrues or arises within British India "shall be chargeable to income tax in the name of the agent of any such person and

(1) (1897) A. C. 22.

(2) (1916) 2 A. C. 307 (338).

such agent shall be deemed to be for all the purposes of the Act the assessee in respect of such income tax." As I read this section the agent of such a non-resident person need not be in receipt of the income on behalf of such person there being no such provision in it as in the preceding sections. The mere fact of agency is sufficient to make him liable to be assessed in respect of the income of the principal. Coming to section 34 it seems to me that it gives merely an extension of the meaning of the term "agent" as including persons who are treated as such, and who may be assessed under section 33 (1) although such persons are not really agents. Section 34 should be read in connection with the preceding section rather than with section 31. Section 34 refers to cases where the non-resident person has no agent in British India appointed by himself and therefore it becomes necessary to find a person who should be "deemed to be an agent" only for the purpose of the Income Tax Act and that can be done by the Collector acting in accordance with the provisions of this section. Section 34 in my opinion was enacted for the purpose of assessing the incomes of persons residing outside British India who are chargeable with Income Tax here but who have not appointed any agents residing in British India who might be assessed under section 33 (1). To hold otherwise, it seems to me, would be to support an anomaly that a person receiving his income through an agent in this country would be assessed, but if he asks his debtor to remit the income direct to him he would escape liability to pay the tax, a thing which this section was intended to remove. It is only necessary that the person on whom the Collector has served a notice under section 34 is a "person employed by or on behalf of a person residing out of British India or having any business connection with such person" and if that condition is satisfied the person on whom such notice has been served shall for the purposes of the Income Tax Act be deemed to be the agent of such person. The question whether the company is a person coming within the description of section 34 presents to my mind very little difficulty.

The company remits the incomes of the persons resident outside British India and should be held to have been employed to do so by or on behalf of the non-resident persons. The company again has without doubt 'connection' with the share-holder and what can that connection be but business connection? The company itself states in its letter to the Collector that on the declaration of a dividend the company is in the position of debtor to the shareholders. Therefore the company also comes within the description

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of "having any business connection" with a non resident person. To say that such person should also be in receipt of income on behalf of the non resident person would be to make the enactment of the section unnecessary, because a person in receipt of income is liable to be assessed under section 31; also it would not be necessary to give him notice of the Collector's intention to treat him as agent, for a person receiving income for another would be an agent under the general law. It was urged on behalf of the company that to make one person liable to income tax for another resident abroad, although he might not receive any income on behalf of such a person might in some cases cause great hardship. The answer to this is twofold; (1) it is a well established rule that Courts ought not to be influenced by any notion of hardship in exceptional or individual cases in interpreting a statute, and (2) in order to prevent any case of hardship the proviso to section 34 has been enacted and the Collector may be trusted to give effect to any reasonable objection before treating a person as agent under this section. In the present case however there can be no such question of hardship. It may be observed that under section 21 of the repealed Income Tax Act (II of 1886) the tax was chargeable in the name of the agent where the income was received through the agent, and there was no provision corresponding to section 34 of the present Act. The alterations in the present Act were in my opinion, made to remove an anomaly as I have already indicated.

I would therefore answer the first question in the affirmative. The answer to the second question depends upon the first and no argument was addressed on it. Therefore the answer to it should also be in the affirmative.

A. T. M.

Reference negatived.

APPELLATE CIVIL.

*Before Sir Thomas William Richardson, Knight, Judge, and Mr.
Justice Sukrawardy.*

SHEIKH SONGSOR ALI

v.

JAGANNATH PAL AND OTHERS.*

*Rent, suit for—Concurrent leases—Subsequent lease, nature of—Lease for
agricultural purposes—No proof as to right to collect rent.*

The defendants in possession were burgadars, the plaintiff claiming the rent under oral settlement from the superior landlord. It was found as a fact that the relationship of landlord and tenant did not exist between him and the defendants, on the ground that there was no proof that the superior landlord had assigned to the plaintiff the right to collect rent from the defendants :

Held, that the suit for rent could not be maintained, though the superior landlord, who was impleaded as a party defendant to the suit, did not contest the plaintiff's suit ; *Ram Kanai v. Fakir* (1) followed.

The oral settlement was not a lease of the proprietary right but a mere hiring out of the land and no privity of contract or of estate was created as between the plaintiff and the defendants.

It will introduce confusion into the administration by the Bengal Tenancy Act, if, when a holding is leased by the landlord for the purposes of cultivation first to one raiyat and then to another, the second raiyat is entitled to collect the rent payable by the first.

In England, the law as to concurrent leases, is curious and technical, and in some respects unsettled.

Appeal by the Plaintiff.

Suit for rent.

The material facts appear from the judgment of Richardson J.

Babu Kupendra Kumar Mitter for the Appellant.

Dr. Sarat Chandra Basak and *Babu Asitranjan Ghose* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

Richardson J. :—The plaintiff appellant before us seeks to recover arrears of rent from the principal defendants Nos. 1 to 5. These defendants hold the land in question as burgadars or cultivators paying half the produce by way of rent. It appears that the

*Appeal from Appellate Decree No. 1025 of 1920, against the decree of Babu Noni Gopal Mukherjee, Subordinate Judge, 4th Court, of Dacca, dated the 22nd January, 1920, reversing that of Babu Binode Behary Roy, Munsiff, 2nd Court, at Munshiganj, dated the 11th January, 1919.

(1) (1904) 8 C. W. N. 438.

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original landlord to whom the rent was due was the defendant No. 7 whose title has since been conveyed to the defendant No. 6. The plaintiff's claim to the rent payable by the defendants Nos. 1-5 is based on a settlement which, as he alleges, he obtained from the defendant No. 7. This was an oral settlement not reduced to writing, and if at the trial it was not disputed that there was some such settlement, the parties were not agreed as to its terms. There being no document to construe, any question as to the nature of the settlement or its terms, is a question of fact.

As I read the judgment of the learned Subordinate Judge in the lower appellate Court he has found on the evidence that the right obtained by the plaintiff from defendant No. 7 was merely the right to cultivate this land as a raiyat and that there was no assignment to the plaintiff of the right to receive rent from the defendants. The case therefore would appear to fall within the decision of this Court in *Ram Kanai Dass v. Fakir Chund Das* (1).

In that case also the defendant in possession was a burgadar, the plaintiff claiming the rent as a jotedar under a subsequent but apparently unwritten lease granted by the superior landlord. There was nothing definite to show what the precise rights of the plaintiff were but the lower appellate Court had found that the relationship of landlord and tenant did not exist between him and the defendant burgadar, on the ground that there was no proof that the superior landlord had assigned to the plaintiff the right to collect rent from that defendant. The plaintiff's appeal to this Court came first before Mitter J. who concluded in his favour. The learned Judge was of opinion that "as between the superior landlord and the defendant, the right of the one to receive rent from the other has passed by the creation of the intermediate holding to the plaintiff." He considered that it was immaterial whether the plaintiff was called a jotedar or a tenure-holder and that no formal assignment was necessary, particularly as the Munsiff had found that the landlord did not object to the plaintiff receiving rent from the defendant. The defendant having appealed however under the Letters Patent, it was held by Sir Francis Maclean C.J. and Parjiter J., that upon the finding of the lower appellate Court the suit for rent could not be maintained.

That decision is sufficient to justify the dismissal of the present appeal, in spite of the argument insistently urged that the superior landlord is impleaded as a party defendant to this suit and has not contested the plaintiff's claim.

The principle seems to be that in these cases the second lease is not a lease of the proprietary rights but a mere hiring out of the land and no privity of contract or of estate is created as between the second lessee and the first lessee.

No sympathy need be felt with the present plaintiff. Both the Courts below have found that taking advantage of his position as subsequent lessee, he made serious efforts, prior to this suit, to oust the principal defendants from the land.

Under the Bengal Tenancy Act the question of the status of the tenant is not without importance. In my opinion it would introduce confusion into the administration of the Act to say that if a holding be leased by the landlord for the purposes of cultivation first to one raiyat and then to another, the second raiyat would be entitled to collect the rent payable by the first.

I will add that the law as to concurrent leases in England appears to be curious and technical and in some respects unsettled. See for instance Woodfall, Twentieth Edition p. 258 and Redman, Second Edition p. 32. In my opinion the appeal should be dismissed with costs.

Suhrawardy J :—I agree.

A. T. M

Appeal dismissed.

*Before Sir Nalini Ranjan Chatterjea, Knight, Judge,
and Mr. Justice Pearson.*

RAJA JAGADISH CHANDRA DEO DHABAL DEB

v.

BHUBANESWAR MITRA AND OTHERS.*

Mortgage—Purchase by mortgagee of equity of redemption—Civil Procedure Code (Act V of 1908), O. 34 R. 14—Receiver, appointment of—Possession, not delivered—Sale in the interim, if valid.

A mortgagee can, with the leave of the Court, purchase an equity of redemption at a sale held in execution of money decree obtained by him upon a claim

* Appeal from Original Decree No. 34 of 1920, against the decree of Babu Haripada Mozumdar, Subordinate Judge, 1st Court of Midnapore, dated the 19th December, 1919.

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independent of the mortgage; the equity of redemption on such sale passes to the purchaser and no right is left in the mortgagor which he can transfer.

It is not enough that an order has been made directing the appointment of receiver. Until the appointment has been perfected and the receiver is actually in possession, a creditor is not debarred from proceeding to execution. The order appointing a receiver is for the benefit of the parties to the action. It does not affect third persons until the appointment is completed and perfected: *Kanailal v. Monoo Bibi* (1). A plaintiff, though he is a mortgagee, obtaining a decree as an ordinary creditor and not as the mortgagee, is a stranger to the suit on a mortgage in which a receiver was appointed.

A sale held without the leave of the Court which appointed the receiver, is not void but voidable: *Kanailal v. Monoo Bibi* (1).

Appeal by the Defendant.

Suit on mortgages.

The material facts appear from the judgment.

Babus Ram Chunder Mozumdar, Pramatha Nath Banerjee, and Jyotis Mohan Bhattacharjee for the Appellant.

Dr. Dwarka Nath Mitter, Babus Bhupendra Kumar Ghose and Sib Chandra Palit for the Respondents.

C. A. V.

The judgment of the Court was as follows :

July, 14.

This appeal arises out of a suit upon three mortgages executed by the defendants 1 and 2 in favour of the plaintiff. The mortgages were dated the 17th July, 1908 (for Rs. 5000) 7th July, 1909 (for Rs. 1300) and 5th May, 1910 (for Rs. 1362) respectively. A nine annas durmokarari right in 10 mouzahs and also a fractional share of the mokarari right in 2 of the mouzahs, and the jote mandali right in another (11th mouzah) were mortgaged. The defendants 3 and 4 were purchasers of some of the properties long after the mortgages.

The suit was originally instituted on the 15th January, 1913, against the mortgagors (the defendants 1 and 2) and the transferees (the defendants 3 and 4), and was laid at Rs. 11, 114-10 as. The defendants 1 and 2 entered appearance and filed written statement on the 9th March, 1913. The preliminary judgment was passed on the 4th November 1913 and the preliminary decree on the 22nd December, 1913.

Two days after the suit was instituted i.e., on the 17th January 1913 an application was made for the appointment of a receiver, and on the 5th May, 1913 an order was made for the appointment of a receiver. On the 20th June, 1913 one Jugabandhu Bose was appointed receiver. On the 16th July, 1913 the plaintiff made an

(1) (1919) 29 C. L. J. 424.

application to the Court stating that Jagabandhu Das was unable to work as receiver and that some one else should be appointed in his place. On the 24th July, 1913 one Khettra Nath Pal was appointed receiver, and on the 26th August, 1913 possession of the properties was delivered to the receiver. On the 25th July, 1914 Khettra Nath was discharged from receivership.

Before the institution of the suit on the mortgages, the plaintiff instituted four suits against the defendants 1 and 2, in the year 1912, three out of which were for rent in respect of the mortgaged properties. The fourth suit was for money due to plaintiff and was brought in the Small Cause Court side of the Subordinate Judge's Court. That suit was decreed against the defendants 1 and 2. The decree was transferred to the Munsiff's Court for execution, and in execution of the decree, a 9 annas share of durmokarari interest of the 10 mouzahs which was mortgaged was sold on the 12th July 1913 for Rs. 1,002 the ostensible purchaser being one Tinkari Bose. On the 17th March, 1914, the defendants 1 and 2 applied for setting aside the sale and it was set aside by the Munsif who held that Tinkari Bose was benamdar for the plaintiff, and the price fetched at the sale was inadequate. On appeal however, the District Judge set aside the Munsif's judgment and confirmed the sale. On application to the High Court a Rule was issued, to set aside the order, but it was discharged on the 23rd November, 1914. On the 8th August, 1914 possession was delivered to Tinkari Bose. On the 7th September 1914 Tinkari Bose applied to be made a party to the mortgage suit and he was made a party on the 14th November, 1914. On the 13th October 1915 Tinkari executed a conveyance of the properties purchased by him in favour of the plaintiff.

In execution of one of the rent decrees obtained by the plaintiff against the defendants 1 and 2, their mourasi interest in two of the mortgaged properties were put up to sale on the 25th May, 1915 and was purchased ostensibly by Tinkari Bose.

In execution of another rent decree obtained by the plaintiff, the jote mandali interest of the defendants 1 and 2 in the 11th mouzah mortgaged was put up to sale and was also purchased by Tinkari Bose on the 22nd January, 1915.

In execution of the third rent decree the *cutchari bari* of the defendants 1 and 2 in the mortgaged properties was put up to sale, and was purchased by the plaintiff himself, on the 6th November, 1913, who obtained possession of it on the 17th July, 1914.

On the 22nd August, 1915 the defendants 1 and 2 sold their

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equity of redemption to the appellant. The appellant on the 14th February 1916 applied to be added as a party to the mortgage suit. The application however was rejected on account of some formal defect on the 18th February, 1916. On the 23rd February, 1916, the application for being added as a party was renewed, and it was again rejected on the 31st July, 1916. The appellant then moved the High Court against the order with the result that the Court ordered that he be made a party and the objections of both parties may be heard. The main objection of the plaintiff was that the appellant did not purchase any interest in the properties so as to entitle him to redemption of the same. The appellant's principal contentions were, first that the purchase ostensibly made in the name of Tinkari Bose was really made by the plaintiff, Tinkari being merely his benamdar; secondly that under the circumstances the plaintiff was really a trustee for the mortgagors, and the appellant was entitled to redeem on accounts being taken between a trustee and beneficiary; and thirdly that the equity of redemption having been sold at a time when the receiver had already been appointed, and without the permission of the Court which appointed the receiver, the sale was altogether void in law, and that even if voidable it can be avoided in the present litigation.

The Court below over-ruled all these contentions of the appellant,

The first question for consideration is whether the purchase by Tinkari was benami for the plaintiff. The onus of proving benami is certainly upon the appellant.

The appellant relies (among other things) upon the observations in the judgment of the Munsif dated the 17th March, 1914 setting aside the sale, and in the order of the High Court dated the 23rd November discharging the rule. The Munsif held that Tinkari was "decree-holder's man and the property was purchased in his benami," and further that "Tinkari Bose is a mere benamdar which fact is not challenged by the decree-holder or auction-purchaser." He also found that there were irregularities in the publication of the sale and the properties were sold at an inadequate price. The order of the Munsif however as stated above was set aside on appeal by the District Judge on the 29th May, 1914. The learned Judge did not consider the question of benami, but held that the properties were not sold at an inadequate price and the judgment-debtors had not sustained substantial loss and accordingly decreed the appeal and confirmed the sale. The High Court in discharging the Rule (granted for setting aside the order of the

District Judge) observed that while the mortgage suit was pending the decree-holder "executed his money decree and in execution purchased some of the mortgaged properties himself." As contended on behalf of the respondent, the order of the Munsif having been set aside by the District Judge on appeal, the appellant cannot rely upon the observations of the Munsif on the question of benami, nor can he rely upon the observation of the High Court as it was merely a statement of facts and not a decision upon the question, no question of benami having been raised or considered by it. It appears that separate appeals were preferred by the plaintiffs and Tinkari against the order of the Munsif to the District Judge, but as stated above the judgment of the District Judge proceeded upon only upon the question whether substantial loss had resulted to the mortgagor by the sale. There is no reference to the question of benami in the judgment, and it does not appear that the question of benami was raised before the appellate Court. All that can be said is that the fact expressly stated in the judgment of the Munsif viz., that Tinkari was benamdar, was not challenged by him or the decree-holder (the plaintiff), before the Munsif, nor before the High Court as the statement of facts quoted above indicates.

The plaintiff has not examined himself. He has however examined Tinkari, and the latter says that he purchased the properties with his own money and was in possession until he conveyed the properties to the plaintiff. There is no evidence that the purchase money belonged to the plaintiff, but the appellant relies upon various matters as showing the improbability of Tinkari being the real purchaser.

Tinkari it appears is a pleader's clerk, his earnings according to his own account are about Rs. 60 per month. He says he has some 10 bighas of lakheraj land and 32 bighas of jamai lands, but the lands are recorded in the record-of-rights in the names of his brothers. He never saw the disputed mouzah and did not make any enquiry about the condition and income of the mouzahs before the purchase. He says he had about 1525 Rupees at the house of Atul Babu pleader whom he served as clerk. This Atul Babu has not been examined. The incumbrances on the properties amounted to Rs. 14,400. There were some costs in taking delivery of possession and a criminal case cost about Rs. 200. It is improbable that a person like Tinkari would purchase the properties at Rs. 1002 with such heavy liabilities when admittedly he made no enquiries about them. The learned Subordinate Judge however says that he was in the *habit* of purchasing properties at auction

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sales for selling them at a profit. But Tinkari speaks of only one such purchase—a *bastu* and that he subsequently sold it. It does not appear what the value of the property was.

The properties purchased by Tinkari at the sale held in execution of the Small Cause Court decree, as well as at the sales held in execution of the rent decrees, were all sold by him to the plaintiff for Rs. 1,101 by a *kobala* dated the 13th October 1915. There is an endorsement of payment of the consideration on the *kobala* by the Sub-Registrar. It is to be observed that in the conveyance it is stated "you shall be entitled to take from my Tehsildar Parbati Charan Bose the balance of the *tehhil* in his hands." The amount of cash money in the hands of the Tehsildar is not stated. Such a provision is extraordinary and is only consistent with the document being a release by a *benamdar* in favour of the real owner. Tinkari admits that there was no account of arrears due from the mahal before the sale to the plaintiff, and the price was settled by making a rough account of income and expenditure and he does not remember if he saw that account.

One Kunjo Patnaik who took delivery of possession is said to have been in the service of Tinkari. Kunjo is admittedly now a clerk of Tinkari Babu pleader son of the plaintiff. Tinkari says that Kunjo was in his service for about a month after delivery of possession of the properties. The delivery of possession took place on the 8th August, 1914. The appellant has produced two post cards which go to show that Kunjo was acting after September, 1914 and up to the time when Tinkari executed the conveyance to the plaintiff. The first post card (Exhibit B) is dated the 15th November 1914 written by Kunjo to Boloram Mahto admittedly a servant of the plaintiff and in charge of the *cutchery bari* after plaintiff's purchase of the *cutchery*. In that post card Kunjo wrote as follows:—"Do not be anxious for your salary and fooding charges. Defray these expenses from your pocket now. I shall go there as soon as I can and on my arrival there I shall pay your salary and other dues." The 2nd post card (Exhibit BI) is dated 6th December, 1914 and is also written by Kunjo to Baloram. It advises the remittance of Rs. 2 by money order for fooding charges of Baloram and then states: "You should guard the fuel and timber and make enquiries if any one commits theft. Tell Tarak Babu (the defendant No. 1) not to cut paddy from the *nij jote* lands of Jadra, and if he cuts forcibly, make 2 or 3 persons witnesses, a criminal case shall have to be instituted against him. Tarak Babu is defeated in the High Court so he has no title to the village."

There is another post card dated the 25th October purporting to be written by Jhareswar Sen to Kunjo, in which it was stated that master had gone to Calcutta, and requested Kunjo to keep the house and the timber and fuel in the charge of Balai (Baloram) Mohta, give directions if any thing "untoward" happened, and also directions about some block of stones for constructing a granary. The Court below says that the genuineness of the post cards had not been satisfactorily proved and even if genuine they do not go to prove much for the defendant. Jhareswar denies that the post card Exhibit B₂ was written by him, but the defendant Tarak says that it is in the handwriting of Jhareswar, and exhibits B & B₁ are in the handwriting of Kunjo. There is nothing suspicious about the appearance of these post cards, and the contents such as are likely to be written to the person addressed. Kunjo who is in the service of plaintiff's son has not been examined. If as Tinkari says, Kunjo was in his service only for about a month after the 8th August, 1914, it is difficult to see why he was writing letters to Boloram about his salary and about the mahal in November or December 1914, nor again why Kunjo should write letters about the payment of salary of Boloram or ask him to look after the affairs of the mahal bearing in mind the fact that Boloram was the plaintiff's servant and in charge of only the *cutchery bari* which alone had been purchased by the plaintiff at that time.

These postcards indicate that at the time when they were written the plaintiff was the owner of the properties (which was long before the conveyance by Tinkari to the plaintiff), and that Kunjo, Boloram and Jhareswar were all agents for and acting for the plaintiff.

The defendant No. 1 Tarak says that he came to the plaintiff at Midnapur for compromise when the appeal in the case for setting aside the sale was pending before the District Judge, and that the plaintiff at that time had agreed to give up the properties if the mortgage debt and also the decretal debt (under the Small Cause Court decree) were paid to him. It is said that Tarak came with one Anukul Babu to see the plaintiff in that connection. This Anukul Babu has not been examined. But the plaintiff has not come forward to deny the facts stated by Tarak.

Then again the defendant examined some witnesses to show that there was some dispute as to the rents payable (about kists and interests) and also about rent-receipts being granted in the name of Tinkari, that they came to the plaintiff for settlement and that plaintiff gave certain orders in that connection. This is said to have taken place before the plaintiff's purchase from Tinkari. The Court

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below has disbelieved the evidence of these witnesses. The witnesses are tenants of the mahal, and the appellant has got a seven annas share in the mouzahs. The same thing however may be said of the witnesses for the plaintiff who denied that there was any such dispute, as the plaintiff is the owner of a 9 annas share of the mouzahs. However that may be, the witnesses for the defendant were examined from the 4th to the 9th December when all those statements were made. The plaintiff's witnesses were examined on the 10th and 11th December and yet the plaintiff did not come forward to deny them. An explanation is attempted in this Court viz., that the plaintiff's daughter was seriously ill at Calcutta and he had to come away. But assuming that was true, there was no application for adjournment of the case, nor any application for examination by commission. There is no doubt that the onus of proving benami was upon the defendant, but after the definite statements made by [the defendants' witnesses as to the plaintiff's dealings with the property indicating that he was the owner of the property, the plaintiff, we think ought to have examined himself and denied those statements on oath. There is also no explanation why Kunjo who as stated above is the clerk of the plaintiff's son was not examined by the plaintiff. We do not think the Court below was right in rejecting the evidence of the plaintiff in the manner it has done.

As to the alleged admission made by the plaintiff that Tinkari was his benamdar, and that the tenants should accept dakhilas in his name, it looks at first sight as improbable, because the real owner, if he wants to retain the benami character is not likely to give out that he is the real owner. But if, what the defendant No. 1 Tarak and the witnesses state viz, that they came to the plaintiff for settlement be true, the very fact that they came to the plaintiff for that purpose before he purchased the property from Tinkari would indicate that the persons concerned knew that Tinkari was the benamdar and plaintiff was the real owner. It is also suggested on behalf of the appellant that the interviews spoken to by Tarak and other witnesses took place after the proceeding for setting aside the sale had been disposed of by the Munsif, and in which the fact that Tinkari was the benamdar for the plaintiff was not challenged by Tinkari or by the plaintiff. There is some force in this suggestion.

It is true that the dakhilas were granted to tenants in the name of Tinkari, and Tinkari was sued for rent by the landlords to some of which the appellant (as a co-owner of the mahal) was a party. But if the purchase by Tinkari was benami for the plaintiff, the papers would stand in the name of the benamidar in order to keep

up the benami character of the transaction as is usual in such cases. The landlords sued the person who was the ostensible purchaser and there is nothing to show that they were aware that Tinkari was not the real owner. Besides they had no interest in raising a dispute as to who was the real purchaser, as they would get decree for rent whether it was brought against the benamidar or the real purchaser. The claim for rent prior to the date of purchase appears to have been contested by Tinkari and the decree directed that he would not be liable for the period to his purchase. But any defence necessary to be set up on behalf of the purchaser would be set up in the name of Tinkari as ostensible purchaser. It appears that one Ramkalpo Ganguli bid at the sale up to Rs. 1,000, and Tinkari bid up to Rs. 1,002. This Ramkalpo appears to have been the am-mukhtear of the appellant's estate at the time of the sale, though he was dismissed subsequently. The appellant again expressed his willingness to purchase the properties a little before proceedings were taken for setting aside the sale. All these facts however are consistent with Tinkari being a benamidar and they only go to show that the appellant was desirous of purchasing the properties, as he has a 7 annas share in the properties and he did as a matter of fact purchase the equity of redemption from the mortgagors on the 22nd August 1915.

The opinion of the trial Court upon the question of credibility of witnesses is certainly entitled to great weight, and the question of benami is not to be decided upon suspicion. But the learned Subordinate Judge has not, we think, given due weight to the circumstantial evidence and the probabilities of the case pointed out above in considering the evidence of the witnesses, and the inference arising from the absence of the plaintiff and Kunjo from the witness box. On the whole we are of opinion that it was the plaintiff and not Tinkari who was the real purchaser.

The next question is whether the plaintiff having purchased the property in execution of a money decree was a trustee for the mortgagors.

Section 99 of the Transfer of Property Act provides that where a mortgagee in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67. The Full Bench in the case of *Ashutosh v. Behari Lal* (1) held that a

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sale held in contravention of the provisions of section 99 of the Transfer of Property Act is not a nullity, but an irregular sale liable to be avoided merely on the proof that the terms of the section had been contravened. Under order 34 rule 14 however, the rule is confined only to claims arising under the mortgage. Here the sale took place on the 12th July 1913, (after O. 34 R. 14 was enacted) in execution of a decree for money upon a claim *not arising under the mortgage*. But the learned pleader for the appellant relies upon the principle of equity enunciated by Macpherson, J. in *Kamini Debi v. Ramlochan Sirkar* (1), and recognised by the Judicial Committee in the case of *Khizarajmal v. Daim* (2). In the former case, Macpherson, J., held that the mortgagee cannot properly in execution of a simple decree for money, the repayment of which is secured by a mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged, but if he does so, and purchases it himself, he becomes a trustee for the mortgagor, against whom he cannot acquire an irredeemable title. This case came up for consideration before the Judicial Committee in *Mohabir Prasad v. Macnaghten* (3), where their Lordships observed that it was probable that in the case of *Kamini Debi* (1), the mortgagee had not obtained leave from the Court to purchase, and that leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. See also *Mahomed Mira Ravuthar v. Savvasi Vigaya Raghunadha* (4). The learned pleader sought to distinguish *Mahabir Prasad's* case (3), on the ground that there the mortgaged property itself was sold, and not merely the equity of redemption. This distinction was also sought to be drawn by the High Court in that case. But their Lordships after referring to the argument of Mr. Doyne based upon the decision of Macpherson J. in *Kamini Debi's* case (1), that "the respondents must be held to have purchased as trustees for the appellants" observed "the same argument which is not raised in the pleadings seems to have been addressed to the High Court, who in their judgment distinguish between that case and the present, on the ground that in the former, the mortgagee did not purchase the mortgaged property, but the mortgagor's equity of redemption. Their Lordships cannot regard that explanation as satisfactory. It appears to them to be probable that, in the case

(1) (1870) 5 B. L. R. 450.

(2) (1904) I. L. R. 32 Calc. 296; L. R. 32 I. A. 23.

(3) (1889) I. L. R. 16 Calc. 682; L. R. 16 I. A. 107.

(4) (1899) L. R. 27 I. A. 17; I. L. R. 23 Mad. 227.

referred to, the mortgagee had not obtained leave from the Court to purchase. The report does not state that he had : and the reasoning of the learned Judge, and the mass of authorities by which he supports it, have a direct bearing upon the case of a mortgagee purchasing without leave, and in that view of the facts his reasoning is intelligible and logical. Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. If the decision of Macpherson J. proceeded on the footing that the mortgagee had obtained leave, their Lordships are not prepared to assent to it. On that footing it appears to them that purchase of the equity of redemption by the mortgagee at a judicial sale would have the same effect against the mortgagor as the purchaser of the mortgaged property." Much reliance is placed on the case of *Khiarajmal v. Daim* (1), where Lord Davey observed :—" Their Lordships throw no doubt on the principle which has been acted on in many cases in India that a mortgagee cannot by obtaining a money decree for the mortgage debt, and taking the equity of redemption in execution relieve himself of his obligations as mortgagee or deprive the mortgagor of his right to redeem on accounts taken, and with the safeguards usual in a suit on the mortgage. It is to be noted that these observations of their Lordships had reference to the case of a purchase by the mortgagee in execution of a *money decree for the mortgage debt*. Referring to the fact that the lower Court had made a decree for redemption of the *whole estate* on the ground that " the mortgagee could not acquire the equity of redemption directly or indirectly by purchase at a Court sale except by a suit brought on the mortgage on accounts taken and time specially allowed for redemption " it was observed :—" Their Lordships cannot concur in this view which they think is based on a misapplication of a sound principle of equity," and then after stating that their Lordships throw no doubt on the principle which had been acted on in many cases in India (quoted above) observed :—" But.....In suit No. 160 of 1878, the debt sued for was not the mortgage debt. The creditors were different and the debtors were different, and the debt does not appear from the plaint to have been secured by a mortgage." It appears therefore that the principle which had been acted upon in many cases in India in their Lordships' opinion was not applicable to cases where *the debt was not the mortgage debt*.

In *Martand v. Dhondo* (2), where the mortgagee in execution

(1) (1904) I. L. R. 32. Calc. 296 ; L. R. 32. I. A. 23.

(2) (1897) I. L. R. 22 Bom. 624.

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of a money decree attached the mortgaged property, and without notifying or disclosing his mortgage lien caused the properties to be sold, and without obtaining leave from Court to bid at the sale, purchased some of the properties benami at an undervalue, it was held that the sale was rendered nugatory not by the provisions of section 294 (though permission to bid granted under that section might have validated the purchase) but by the impossibility of a mortgagee by such sales and purchases freeing himself from the liability to be redeemed. The learned Judges referred among other cases to *Bhuggobutty Dossee v. Shamachurn Bose* (1) and *Kamini v. Ramlochan* (2) but did not refer to *Mohabir Prosad v. Macnaghten* (3) nor does it appear to have been cited in argument.

In the case of *Mayan Pathuti v. Pakuran* (4) the question for decision was whether a sale in contravention of section 99 of the Transfer of Property Act was void or merely voidable and it was held that it was the latter. There is an observation however, that "notwithstanding the confirmation it may be that the sale in question cannot affect the right of the appellants owing to the impossibility of the respondent as mortgagee, freeing himself by such a sale and purchase, from the liability to be redeemed *Martand v. Dhondo* (5)." In that case the sale was in contravention of the provisions of section 99 of the Transfer of Property Act.

In later case *Dharamikota v. Budharazu* (6), the Madras High Court declined to follow the decisions in *Kamini Debi v. Ramlochan* (2), and *Martand v. Dhondo* (5). In the case of *Muhammad v. Dilsukh Rai* (7), where the equity of redemption was not sold in execution of a money decree obtained for the mortgage debt Stanley C. J. and Burkitt J. observed "Independently of the provisions contained in section 99 of the Transfer of Property Act, we are not prepared to hold that a mortgagee is precluded by law from purchasing the equity of redemption and freeing himself from his liability to be redeemed provided that the purchase is carried out in complete good faith and no advantage is taken by him of his position as mortgagee. We are not aware of any principle upon which such a sale can be impeached merely on the ground that the purchaser was a mortgagee of the purchased property." In a later

(1) (1876) I. L. R. 1 Calc. 337.

(2) (1870) 5 B. L. R. 450.

(3) (1889) I. L. R. 16 Calc. 682; L. R. 16 I. A. 107.

(4) (1898) I. L. R. 22 Mad. 347.

(5) (1897) I. L. R. 22 Bom. 624.

(6) (1907) I. L. R. 30 Mad. 362.

(7) (1903) I. L. R. 27 All. 517 (524).

case *Lal Bahadur Singh v. Abharan Singh* (1), a Full Bench of the Allahabad High Court were of opinion that if a mortgagee brings the mortgaged property to sale in contravention of the provisions of section 99 of the Transfer of Property Act, such sale is not void, but merely voidable. Stanley C. J. observed, "It seems to me that if the equity of redemption is sold in execution of a decree and purchased either by a third party, or by a mortgagee with the leave of the Court, the equity of redemption is transferred from those persons who previously held it to the purchaser and that the result is that if the sale is neither void nor set aside, there is no longer a right to redeem left in the previous owners of the equity of redemption." The question in these cases was whether a sale in contravention of section 99 of the Transfer of Property Act is a nullity—a question which was settled in our Court by the decision of the Full Bench in *Ashutosh Sikdar v. Behari Lal* (2). But in *Pancham Lal v. Kishun Pershad* (3). Woodroffe and Caspersz JJ. observed that it was a well-established principle that a purchase by the mortgagee of the equity of redemption constitutes him a trustee for the mortgagor, that he does not (unless there has been a release of the equity of redemption or other circumstance which in law would bar his right to redeem) acquire an irredeemable title, and that the mortgagor is under no necessity to have the sale set aside first in order to be entitled to redeem the property. But in that case although the property was sold in execution of a money decree (on a *roka*) it was governed by the provisions of section 99 of the Transfer of Property Act which was then in force. On the other hand, Mookerjee and Beachcroft JJ., in the case of *Bharat v. Ishan* (4) held that a mortgagee can purchase an equity of redemption at a sale held in execution of a money decree obtained by a stranger against the mortgagor and that he does not hold the equity of redemption as a trustee for the mortgagor and for his benefit. The learned Judges dissented from the case of *Erusappa v. Commercial and Land Mortgage Bank, Limited* (5), and distinguished the case of *Pancham Lal v. Kishun Pershad* (3), on the ground that it was a case of a purchase by the mortgagee in contravention of the provisions of section 99 of the Transfer of Property Act. The case of *Pancham Lal* (3), came up for consideration before the Full Bench in *Uttam Chandra Daw v. Raj Krishna Dalal* (6). It is contended for the appellant that the

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(1) (1915) I. L. R. 37 All. 165.

(2) (1907) I. L. R. 35 Calc. 61; 6 C. L. J. 320.

(3) (1910) 12 C. L. J. 574; 14 C. W. N. 579.

(4) (1917) 27 C. L. J. 431.

(5) (1899) I. L. R. 23 Mad. 377.

(6) (1919) I. L. R. 47 Calc. 377; 31 C. L. J. 98.

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principle of equity was recognized in that case, but could not be given effect to having regard to the form in which the suit was laid. The equity of redemption in that case was sold in execution of a decree upon a claim not arising under the mortgage, but the principle of equity was considered on the assumption that the sale was held in execution of a decree arising under the mortgage. One of the learned Judges (Mookerjee J.) expressed his opinion that there was no such equity. The other Judges did not express any definite opinion as the suit was not one framed for enforcing the trust if any, nor brought within the period of limitation prescribed for such a suit. It cannot therefore be said that the Full Bench decided the point raised before us.

But the principle of equity enunciated by Macpherson J. in *Kamini Debi's* case (1) was with reference to a simple decree for *money the repayment of which is secured by a mortgage*. In the case of *Khiarajmal v. Daim* (2) also Lord Davey, referred to the principle of equity as applicable to cases where the equity of redemption is sought to be taken in execution of a *money-decree* for the *mortgage debt*. In the other cases cited above there was either a contravention of the provisions of section 99 of the Transfer of Property Act (in cases decided before order 34, rule 14 was enacted) or no leave to bid was obtained by the mortgagee.

It is unnecessary to consider in the present case whether the principle of equity is applicable to such cases. In the present case the equity of redemption was sold in execution of a decree for money upon a claim quite independent of the mortgage. The leave of the Court was obtained by the mortgagee, to bid at the sale. The judgment-debtors applied for setting aside the sale but the application was dismissed by the appellate Court, and the sale was confirmed. The equity of redemption passed to the purchaser, and no right was left in the mortgagors which they could transfer to the appellant. The appellant in these circumstances cannot contend that the purchaser held the property as trustee for the mortgagors, assuming that the appellant as a defendant can set up the trust as an answer to the suit without bringing a suit to enforce the trust if any.

We are accordingly of opinion that the second contention must be over-ruled.

The third contention is that the sale having been held at a time when a receiver was appointed, without the permission of the

(1) (1870) 5 B. L. R. 450.

(2) (1904) 1. L. R. 32 Calc. 296; L. R. 32 I. A. 23.

Court which appointed the receiver, the sale is void, at any rate is voidable and can be declared invalid in the present suit.

As stated above an application for appointment of receiver was made on the 17th January, 1913, and an order was made for the appointment on the 5th May 1913. On the 20th June 1913, an order was made for appointing Jagabandhu Bose a receiver and for removal of defendants 1 and 2 from possession and delivery of possession to the receiver. The plaintiff on the 16th July 1913, put in a petition to the Court stating that Jagabandhu was unable to work and prayed that one Khetra might be appointed receiver. Khetra was appointed receiver on the 24th July, 1913, and the Nazir was directed to deliver possession to Khetra by removal of the defendants 1 and 2 from possession. But the sale had taken place on the 21st July 1913 before Khetra was appointed. It is contended however that the order for appointment of Jagabandhu as receiver was made before the sale (on the 5th May 1913) and Khetra was appointed in his place, that the legal effect of the appointment was to vest the estate in the receiver and the legal possession must be taken to have been with the receiver, though no actual possession was taken until Khetra was appointed on the 24th July 1913.

As there was no order for security being given by the receiver, the order for appointment had the effect of vesting the estate in the receiver as between the parties to the suit i.e. as between the mortgagor and the mortgagee. But in the first place, the plaintiff, though he was the mortgagee, obtained the decree in the Small Cause Court not as a mortgagee, but as an ordinary creditor, and as such stood in the same position as a stranger to the suit. Now the rule that "the possession of a receiver may not be disturbed without leave, does not apply, so far at least as third persons are concerned, until a receiver has been actually appointed, and is in actual possession. It is not enough that an order has been made directing the appointment of receiver. Until the appointment has been perfected and the receiver is actually in possession a creditor is not debarred from proceeding to execution. The order appointing a receiver is for the benefit of the parties to the action. It does not affect third persons until the appointment is completed and perfected. An execution creditor may therefore seize chattels after an order has been made appointing a receiver on his giving security but before the security has been given or possession taken." (See Kerr on Receivers 7th Edition 195—196. *Kanailal Jalan v. Manoo Bibi* (1). In the next place, the sale held without the leave of the

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Court which appointed the receiver was not void, but was only voidable. Reference was made to High on Receiver, 4th Edition page 167 where it is stated "Even though an execution has been levied upon the property before the appointment of the receiver, it is held that there cannot be a lawful sale under such execution without leave of the Court appointing the receiver.....And the sale under execution of the equity of redemption of premises which are in the possession of a receiver pending a foreclosure suit is void and no title thereunder passes to the purchaser." The property in the cases referred to in the above passage however was in the actual possession of the receiver. In our Court moreover, sales of properties in the possession of the receiver without leave of the Court which appointed the receiver have not been treated as void, but as voidable. In the case of *Livinia Ashton v. Madhabmoni Dasi* (1) it was observed "A purchaser of such property (in the hands of a receiver) at an execution sale buys at his peril and the sale may be cancelled upon an appropriate application to the execution Court" and in *Kanailal Jalan v. Manoo Bibi* (2), the learned Judges said, "It is further clear that the sale held at the instance of the Moharaja was at the worst only voidable, in other words when property is in the custody of a receiver appointed by another Court, a sale under an execution issued by another Court may be avoided by an appropriate process. In the case before us, no steps have ever been taken either by the receiver or by the beneficiaries for cancellation of the execution sale in which the Moharaja became the purchaser."

In the present case it appears from the judgment of the High Court discharging the Rule obtained by the Defendants Nos. 1 and 2 in the proceedings for setting aside the sale, that the sale was sought to be set aside on two grounds, one of which was that the sale was held without taking the permission of the Court which appointed the receiver. But although the question was raised it was abandoned, and the mortgagors having abandoned the point, their assignee the appellant cannot be allowed to raise it again by way of defence to a suit. We are accordingly of opinion that this contention also should be over-ruled.

Although we are of opinion that the plaintiff purchased the property in the benami of Tinkari, the appeal must fail on our findings upon the other two points.

The result is that the appeal must be dismissed but we direct that each party do bear his own costs in both Courts.

A.T. M.

Appeal dismissed.

(1) (1910) 11 C. L. J. 489 (494); 14 C. W. N. 560. (2) (1919) 29 C. L. J. 424.

CIVIL RULE.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Rankin.

MANADANANDA JHA AND OTHERS

v.

TARAKANANDA JHA AND OTHERS.*

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1925.

February, 5, 2.

Scheme—Modification of—Scheme for administration of charitable trust—Succession, rules for.

A Court which has sanctioned a scheme for the administration of a charitable trust, is competent from time to time, to vary the scheme as exigencies of the case may require : *Prayag Doss v. Tirumala* (1) and other cases.

A clause inserted in the original decree in a suit for removal of a trustee and for a settlement of a scheme for the management of the institution, ran as follows : " Liberty to any person interested from time to time to apply to the High Court for any modification of the schedule that may appear to be necessary or convenient" :

Held, that the High Court was not competent to vary the rules for succession of high priest, which were determined in the original suit according to ancient usage. A variation in this respect could not be taken to be " a modification of the scheme that may appear to be necessary or convenient," within the meaning of the clause. Hence an attempt of the petitioners, who were defendants in the original litigation, to have a rule inserted to the effect that certain persons were entitled to succeed to the office in certain events, must fail. Their omission to set up the contention now raised, operated as a bar.

Claims for the office of high priest.

Rule No. 136 F was issued at the instance of Manadananda Jha, who claimed to be the daughter's son of the deceased high priest and his adopted son. Rule No. 144 F. was issued at the instance of Bhabapritananda Jha, who claimed to be the grandson of the high priest (who was removed from the institution), by a predeceased son. Rule No. 2 F was issued at the instance of Param Prakashananda Jha, the second son of the high priest, who was removed from the institution.

The material facts appear from the judgment.

Babus Mahendra Nath Ray, Ram Chunder Mozumdar, Hira Lal Chuckerbutty, Mritunjoy Chatterjee, Pramatha Nath Bandoopathya and Rama Prosad Mookerjee for the Petitioners.

* Civil Rules Nos. 136 F. and 144 F of 1922 and 2 F of 1923 in connection with Appeals from Original Decrees Nos. 234 and 323 of 1901, dated the 16th June, 1905.

(1) (1905) I. L. R 28 Mad. 319.

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v.

Tarakananda.

February, 8.

Dr. Dwarka Nath Mitter, Rai Bahadur Jogendra Chunder Ghose, Babus Sarat Kumar Mitter, and Promode Kumar Ghose for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee J: The facts material for the determination of the questions which require consideration in these Rules may be briefly stated.

On the 15th April 1897 one Umeshananda Dut Jha along with two other persons instituted a suit under section 539 of the Code of 1882, with the consent of the then Advocate-General, for the removal of the high priest of the Baidyanath Temple and for the Settlement of a scheme for the management of the institution. Sailajananda Dut Jha, the high priest at the time, was the original defendant in that litigation. Subsequently his son Param Prakashananda Jha and his grandson by a predeceased son Bhabapratnananda were added as defendants. After a protracted trial, the judgment was pronounced on the 4th July 1901 by Mr. Joges Chunder Mitter, then District Judge of Burdwan. The substance of the decision was that the high priest was ordered to be removed from his office and a scheme was drawn up for the management of the institution in future. Before the decree could be signed, Mr. Mitter left the District, with the result that on the 15th July 1901 a decree was drawn up pursuant to his judgment and was signed by his successor in office, Mr. G. K. Deb. On the 5th August 1901 the decree was amended by Mr. H. D Carey, the next District Judge, by the insertion of several schedules on the basis of the judgment. On the same day an appeal was lodged in this Court by the original defendant Sailajananda Dut Jha. This purported to be an appeal against the decree as signed by Mr. G. K. Deb. On the 2nd December 1901 another appeal against the decree was lodged in this Court by Param Prakashananda. During the pendency of the appeals in this Court, on the 21st April, 1902, a copy of the decree as amended by Mr. Carey was attached to the memorandum and thereafter the appeals proceeded on the assumption that they were directed against the amended decree. On the 16th June 1905 this Court pronounced judgments in the appeals : *Shailajananda v. Umeshananda* (1). The appeal by Sailajananda Dut Jha was dismissed but the appeal preferred by Param Prakashananda was allowed. The decree of the District Judge was modified at his instance, but in the decretal order which was drawn up in this Court

(1) (1905) 2 C. L. J. 460.

the precise variation was not specified. On the 8th September 1910 this Court proceeded to insert two clauses in the original decree to the following effect : First, liberty to any person interested to apply to the District Court with reference to the carrying out of the direction of the scheme ; and secondly, liberty to any person interested from time to time to apply to the High Court for any modification of the scheme that may appear to be necessary or convenient. It was found necessary to insert these clauses because disputes had broken up between the committee of management appointed under the scheme and the new high priest Umeshananda Dut Jha who had taken charge of the institution on the removal of Sailajananda Dut Jha. The principle on which these clauses were inserted in the decree was explained by this Court in the following passage of its judgment in the case of *Umeshananda Jha v. Ravanawar Prosad Singh* (1).

"The authority of the Court to amend the scheme from time to time has not been and cannot possibly be questioned. As was pointed out by Mr. Justice Subramaniam Ayyar in the case of *Prayag Dass Ji Varu v. Tirumala Srirangacharla Varu* (2), which was subsequently affirmed by the Judicial Committee in *Prayag Dass Ji Varu v. Tirumala Srirangacharla Varu* (3), there is ample authority for the proposition that a Court which has sanctioned a scheme for the administration of a charitable trust is competent from time to time to vary the scheme as exigencies of the case may require. Reference need only be made to the decisions in *Attorney General v. Bovell* (4) *Attorney General v. Bishop of Worcester* (5), *Mayor of Lyons v. Advocate-General of Bengal* (6), and *Re Browne's Hospital, Stamford* (7)."

The result of the insertion of these clauses was that parties interested in the management of the institution did from time to time apply to this Court for amendment of the scheme as originally settled and one of these instances is to be found in the case of *Umeshananda Dut Jha v. Ravanawar Prosad Singh* (8). A copy of the scheme as varied from time to time is not on the record of this Court and it is consequently impossible for us to state what the precise position of the scheme is at the present moment. We shall presently give directions so that this difficulty may be avoided in future.

(1) (1917) 43 I. C. 772 (774).

(2) (1905) I. L. R. 28 Mad. 319.

(3) (1906) I. L. R. 30 Mad. 138.

(4) (1840) 1 Phillip 762 ; 65 R. R. 506.

(5) (1851) 9 Hare 328 ; 89 R. R. 47.

(6) (1876) 1 App. Cas. 110.

(7) (1889) 60 L. T. 288.

(8) (1912) 16 C. L. J. 431.

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It is sufficient to state for our present purposes that Umeshananda who had succeeded Sailajananda died on the 12th April 1921. The immediate result was that rival claimants appeared on the scene for the office of Sardar Panda or high priest and the Rules which are now before us represent the result of this struggle. Rule 136 has been issued at the instance of Manadananda Jha who claims to be the daughter's son of Umeshananda and his adopted son. His age is stated to be 25 years. Rule 144 has been issued at the instance of Bhabapritananda Jha whose age is 37 and who is stated to be the grand son of Sailajananda by a predeceased son Tripurananda. Rule 2 of 1923 has been issued at the instance of Param Prokashananda Jha the second son of Sailajananda whose age is stated to be 49. The object of Param Prokashananda is to secure a variation of the scheme so as to entitle him to succeed to the office of high priest by right of inheritance. The object of Manadananda Jha as also of Bhabapritananda is to remove the bar of age restriction so as to enable them to stand for election to the office of high priest.

It is at this stage necessary to recite that three schedules were annexed to the decree when it was amended by Mr. H. D. Carey on the 18th January 1902. Schedule (A) sets out the rules for the succession of the Sardar Panda according to ancient usage. Schedule (B) contains a statement of the duties of the Sardar Panda as ascertained by the Court to be according to ancient usage and as laid down for the proper management of the Debutter properties. Schedule (C) defines the duties of the committee appointed as part of the scheme of management decreed in the suit. We are now concerned only with the terms of schedule A. This embodies two rules in the following terms :

(1) The succession to the office of Sardar Panda devolves usually upon the first born son of the last Sardar Panda to the exclusion of all others, provided that the said eldest son is at least 45 years of age and otherwise duly qualified, and if the said first born son be dead, or be disqualified by ill-health or otherwise at the time of the said devolution of the office, then his son is entitled to succeed, if he be, at least of the said age and otherwise duly qualified.

(2) Where the person so entitled by inheritance to succeed is of an age less than 45 years, another person of the said family, if there be any, and in default of such, a person of another family being of the said age of 45 years and otherwise duly qualified, shall be elected by a majority of votes of the Pandas to hold office for life, and on his death, the heir under the first rule above, who was

excluded by this election, shall succeed if of the said age of 45 years and otherwise duly qualified.

It may be stated at the outset, that it is not competent to this Court to vary the rules for succession of Sardar Panda which were determined in the original suit according to ancient usage. A variation in this respect cannot be taken to be "a modification of the scheme that may appear to be necessary or convenient," within the meaning of the second clause inserted in the decree on the 8th September 1910 on the authority of the cases already mentioned. It is consequently inevitable that the attempt of Param Prokashananda to have a rule inserted to the effect that the second son of the high priest is entitled to succeed to the office in certain events must fail. It may be pointed out that Param Prokashananda was a party defendant to the original litigation. He was dissatisfied with the decree made therein and did in fact prefer an appeal to this Court. At his instance the decree of the trial Court was varied in an important particular. It was open to him in that appeal to set up the contention which he has advanced in the present Rule. His omission then operates as a bar and he cannot now be allowed practically to have a fresh appeal against the decree of the trial Court after the lapse of all these years. Similar observations apply to the applications made by Manadananda Jha and Bhabapretananda Jha for modification of the rules for succession of the Sardar Panda with a view to the removal of the bar of age restriction.

The question, however remains what are the rules for the succession of the Sardar Panda according to ancient usage as determined by this Court. With regard to this matter there has been some misapprehension. It has been stated to us that the effect of the decision of this Court in the appeal preferred by Param Prokashananda has been interpreted to be that the rules for succession of the sardar Panda as formulated by the District Judge were maintained and that nevertheless an exception was made in his favour—an exception which contradicts the rule in a material particular. We have carefully considered the judgment which was delivered in the appeal preferred by Paramprokash and we have without hesitation come to the conclusion that the effect of this judgment was to modify the rules for the succession of the Sardar Panda as enunciated by the District Judge, on the basis of the evidence on the record. Mr. Justice Harington, after a discussion of the conflicting evidence on this point, formulated the rule in the following terms :

"If the eldest son of the Ojha has attained the age of 40 at the death of his father, he is entitled to the Ojhaship by right of suc-

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cession. If he has not attained that age there must be an election by the Pandas and the person whom they elect as high priest is entitled to fill that office subject only to confirmation by the Government. There are several instances in which a person elected by the Pandas was under the age of 40. But our attention has been drawn to no instance in which the person entitled to the Ojhaship by succession has been called upon to submit himself to the votes of the Pandas if he was over 40 years of age at the time when the office descended to him." The consequence was that both the rules enunciated by the District Judge with regard to the succession of the Sardar Panda were modified by this Court because this Court took a view of the evidence relating to the ancient usage applicable to the subject, different from that adopted by the trial Court.

In our opinion it is necessary that the decree as framed by the District Judge on the 18th January, 1902, should now be amended so that full effect may be given to the judgment of this Court delivered on the 16th June, 1905, in the appeal preferred by Param Prokashananda. The result will be as follows :

First, the succession to the office of Sardar Panda devolves usually upon the first-born son of the last Sardar Panda to the exclusion of all others provided that the said eldest son is at least 40 years of age and otherwise duly qualified ; and if the said first born son be dead or be disqualified by ill-health or otherwise, at the time of the said devolution of the office, then his son is entitled to succeed, if he be, at least of the same age and otherwise duly qualified.

Secondly, where the person so entitled by inheritance to succeed is of an age less than 40 years, another person of the said family, if there be any, and in default of such, a person of another family though not of the same age of 40 years and who is otherwise duly qualified, shall be elected, by the majority of votes of the Pandas, to hold office for life, and on his death, the heir under the first rule above, if he had been excluded by the election, shall succeed, if of the said age of 40 years and otherwise duly qualified, subject to the approval of the District Judge.

If this amendment be made the purpose which Manadananda has in view will be achieved. But Param Prakashananda will have to face an election.

We must not be taken, however, to decide, apart from the question of age restriction, that either Manadananda or Bhabapretananda is otherwise duly qualified for the office of high priest. It has been stated before us that as regards Manadananda there is a question of

his title by alleged adoption as the son of Umeshananda. As regards Bhabapretananda, it has been mentioned that there is a question of legitimacy. In these circumstances, we express no opinion whatever upon the question of right of either of these persons to stand for election, and the District Judge will be free to deal with the matter on such materials as may be placed before him. The only direction that we give at present is that the decree of the District Judge dated the 18th January 1902 embodying in schedule A the rules for the succession of the Sardar Panda according to ancient usage be amended as stated above. There will be no order for costs of these Rules.

We direct that a copy of the decree dated the 18th January, 1902, as originally framed together with all modifications which might have been made by orders of this Court be prepared and attached to the decrees of this Court in F. A. 234 of 1901 and F. A. 323 of 1901 and that hereafter whenever a variation is made by this Court in the decree a note thereof be made so as to make it possible for the Court to ascertain at a glance the precise condition of the decree at the time when the question arises for consideration.

A. T. M.

Rules made absolute.

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PRIVY COUNCIL.

PRESENT: *Lord Buckmaster, Sir John Edge, Sir Lawrence Jenkins, and Lord Salvensen.*

RANI JAGADAMBA KUMARI

v.

THAKUR WAZIR NARAIN SINGH.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA].

Impartible estate—Partition—Intention—Accretion—Produce of impartible estate—Joint family.

It is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever, and this is also true with regard to an impartible estate. Clear and strong evidence is necessary to establish such separation: *Glirja Bai v. Sadashiv* (1), and *Kawal Nain v. Prabhu Lal* (2) referred to.

(1) (1916) L. R. 43 I. A. 151; I. L. R. 43 Calc. 1031; 24 C. L. J. 207.

(2) (1917) L. R. 44 I. A. 159; I. L. R. 39 All. 496; 26 C. L. J. 101.

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The produce of an impartible estate does not necessarily belong to and form an accretion to the original property. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely disassociated from the ownership of the Raj. Nor could the monies have been used by him for the purpose of acquiring or endowing an impartible estate.

In the case of an ordinary joint family estate, the income, equally with the corpus forms part of the family property, and if the owner of the estate mixes his own monies with the monies of the family property, his own earnings share with the property with which they are mingled the character of joint family property; but no such considerations necessarily apply to the income from impartible property.

Appeal from the decree of the High Court of Judicature at Patna (Chapman and Roe JJ.) affirming that of the Subordinate Judge of Hazaribagh dated the 18th September 1911.

The suit was for establishing the title of the plaintiff to an impartible estate known as the Serampore Raj or Gadi and certain movable and immovable property, cash and securities which had been purchased out of the income of that estate. The suit was decided against the defendant appellant adversely, with the exception of the claim to certain Government securities. The other material facts are stated in their Lordships' judgment and in the High Court judgment reported in 2 Patna Law Journal 239.

De Gruyther, K. C., E. B. Raikes and Palat for the Appellant.

A. M. Dunne, K. C., and Kenworthy Brown for the Respondent.

C. A. V.

The judgment of their Lordships was delivered by

December, 20.

Lord Buckmaster :—The appellant in this case is the widow of Raja Saroda Narain. The respondent is the nearest male agnate of the deceased, being the son of one Nilkantha Narain, the original plaintiff in the suit, who was the son of Bharath Singh. The proceedings were instituted for the purpose of establishing the title of the plaintiff to an estate known as the Serampore Raj or Gadi and certain movable and immovable property, cash and securities which had been purchased out of the income of that estate. The questions with regard to the estate and the monies and property representing the investments from this income are distinct, and need to be separately considered. They have both been decided adversely to the appellant, with the exception of the claim to certain Government securities which will be more specially referred to hereafter. Serampore Raj or Gadi is impartible, and

the family is governed by the Mitakshara law. If there had been no division of the family the property would have passed to the plaintiff, but it is asserted that Bharath Singh separated from his father in his lifetime, and that consequently neither he nor the plaintiff was joint in estate with Raja Saroda Narain.

Now, the facts upon which this alleged separation is based have been concurrently found by the two Courts, and are no longer the subject of dispute. The argument properly open to the appellant is not upon the facts themselves, but that these facts, when accepted, do establish separation. The facts are these : The village of Chowrah was granted, at a date not precisely ascertained but many years ago, by the then Raja to the plaintiff's father Bharath Singh by way of maintenance on a mokurari grant at a nominal rent. The plaintiff's father, who died in 1879, does not appear to have gone to reside at Chowrah, but the plaintiff went there about 1885, when the then Raja was a minor and his estate was under the management of the Court of Wards. The effect of this change of residence necessarily effected a separation in food and mess. The High Court hold distinctly that there was no separation in religion, and the learned Subordinate Judge holds that there was no separation beyond the separate living in the maintenance village and the consequent separate messing.

The cases of *Girja Bai v. Sadashiv Dhundiraj* (1), and *Kawal Nain v. Prabhu Lal* (2) are clear decisions that it is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever, and this is also true with regard to an impartible estate ; but as in that case the person separating forfeits his chance of inheriting the whole of the estate by survivorship, it requires strong evidence to establish such separation.

The case in 44 I. A. illustrates this. It was there found that the separation relied on was a complete separation in worship, in food, and in estate ; and, further there was good reason for the complete separation, and that consequently the requisite evidence was forthcoming. In this case these conditions are lacking, and their Lordships are unable to think that there has been any misapplication of the principles of law which regulate this question, and the findings of fact are sufficient to defeat the appellant's claim.

The second question gives rise to greater difficulty. It appears that Raja Saroda Narain, when he inherited the estate, was a minor. The estate was then placed under the custody of the Court of Wards.

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(1) (1916) L. R. 43 I. A. 151.

(2) (1917) L. R. 44 I. A. 159.

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On his obtaining majority the Raja entered into possession and appears to have managed the estate with care and skill. Towards the end of his life misfortune overtook him and he became insane. His estate was once more placed under the custody of the Court of Wards, and so remained until his death in 1907.

Originally the estate was in debt, and as there is no evidence of any acquisition of property from other sources, it follows that all the estate possessed by the Raja other than the impartible Raj was derived from the income of the Raj itself. In the end this income produced very considerable property. There were certain villages, certain mortgages—usufructuary and otherwise—sums due on bonds and decrees, Government promissory notes to the extent of two lacs, and other moveable and immovable properties. With the exception of the Government promissory notes the whole of these have been awarded to the plaintiff upon the ground that they represented an accretion to the estate and descended with it. Their Lordships think that this conclusion is wrong, and that its error is due to the idea that the produce of the impartible estate naturally belongs to and forms an accretion to the original property. In fact, when the true position is considered there is no accretion at all. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely disassociated from the ownership of the Raj. Nor could the monies have been used by him for the purpose of acquiring or endowing an impartible estate; *such an estate is the result of a special grant, and can only be recreated by statute.** It is, therefore, a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character.

It is possible that this confusion is due to the consideration of the position with regard to an ordinary joint family estate. In such a case the income, equally with the corpus, forms part of the family property, and if the owner of the estate mixes his own monies with the monies of the family *property** as, for example, by putting the whole into one account at the bank, or by treating them in his accounts as indistinguishable—his own earnings share with the property with which they are mingled the character of joint family property; but no such considerations necessarily apply to the income

* These portions in italics were omitted by their Lordships in a revised judgment—Ed.

from impartible property. The whole of the evidence on the matter in the present case, as stated by the High Court, is as follows :—

"Some new properties were acquired out of the savings of Serampore Gadi. When there were savings in my hand I used to send the money to the Raja and take receipts from him. The money was utilised by the Raja by giving loans and purchasing other properties. On some occasions the Raja used to lend the money himself, and these sums are not entered in our books. When the loan was given through us, then we used to keep accounts of such money. I can't give the sums that passed through our hands or their probable amount. The moneys that passed through our hands were invested in loan and also in purchasing zemindaris. The incomes of zemindaris purchased were also entered in our books. It was treated as part of the income of the estate. Loans with interest repaid were also entered in our books. That money was also treated as part of the estate. All this was done at the instance of the Raja. Loans advanced by the Raja personally and not through our hands, and those that were not entered in the estate account at the time of the advance, the money when repaid used sometimes to come to our hands and sometimes paid to the Raja direct. Those that came to our hands were entered in our book. What was so entered into the estate account was considered as estate money with the Raja's consent. I can't say if the Raja purchased any landed estate out of the money advanced by him personally."

For the reasons already given such a statement is insufficient to affect the property with the character of impartibility. Whether it be possible in any circumstances to treat moveable property as an accretion to a landed estate of this character is a matter not arising for decision.

It is true that in *Sarabjit Partap Bahadur Sahi v. Indarjit Partap Bahadur Sahi* (1), it was decided that movable property could be so regarded, but as the point does not arise here their Lordships need only say that they must not be regarded as accepting the soundness of that decision. The facts here are not very different from those in *Srimati Rani Parbati Kumari Debi v. Jagadis Chunder Dhabal* (2), where it was held that the evidence was inadequate to show that certain mouzahs bought out of the savings of the zemindar were attached to the zemindary. In both *Janki Pershad Singh v. Dwarka Pershad Singh* (3), and *Murtaza Husain*

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(1) (1904) I. L. R. 27 All. 203 (253).

(2) (1902) L. R. 29 I. A. 82; I. L. R. 29 Calc. 433.

(3) (1913) L. R. 40 I. A. 170; I. L. R. 35 All. 391; 18 C. L. J. 200.

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Khan v. Mahomed Yasin Ali Khan (1), the addition of family property to the original Raj is considered. Both these cases dealt with property other than movable property. In the present case their Lordships can see no evidence in the facts stated of any sufficient intention to treat the acquired properties—whether the mouzahs, mortgages or other personal estate—as part of the original Raj. The consequence is that to that extent the appellant succeeds, and the decree of the High Court must be varied by declaring that the decree for possession made in favour of the respondent be further varied by providing that it shall not include items 2, 3, 5, 6, 7, and 9 in Schedule A to the plaint. The respondent will pay the costs of the appeal.

They will humbly advise His Majesty accordingly.

A. T. M.

Decree varied.

(1) (1916) L. R. 43 I. A. 281; I. L. R. 38 All. 552; 25 C. L. J. 1.

APPELLATE CIVIL.

Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and Mr. Justice Cuming.

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December, 18.

RAJENDRA LAL SAHA

v.

ABDUL KARIM AND OTHERS.*

Limitation—Decree, execution of—Step in aid of execution—Continuation of proceeding.

Whether an application is or is not a step in aid of execution, depends on the circumstances of each case.

Objections under section 47 of the Code of Civil Procedure were filed on the 17th April, 1917 and on the 28th April, 1917, the decree-holder applied for time for obtaining copies of the objections and citing witnesses. The cases were adjourned to 26th May, then to the 23rd June and again to the 25th June. No

*Appeals from Appellate Orders Nos. 333 and 334 of 1921, against the orders of C. Bartely Esq, District Judge of Mymensingh, dated the 30th July, 1921, affirming those of Babu Ram Chandra Banerjee, Subordinate Judge, 3rd Court, of Mymensingh, dated the 21st February, 1921.

written statements were necessary and no witnesses were cited. On the 25th June, the decree-holder's pleader stated that he would not prosecute the cases any further and the execution cases were accordingly dismissed for non-prosecution. The objection cases were thereupon disposed of on the next day :

Held, that an application for execution presented on the 26th April, 1920 was barred by limitation as, under the circumstances of the case, the application for time filed by the decree-holder on the 28th April, 1917, did not constitute a step in aid of execution.

That the application could not be considered as continuation of previous applications, as the question was not raised in either of the Courts below and as in the application the decree-holder asked for other different reliefs.

Applications for execution of decrees by the Decree-holder.

The material facts appear from the judgment.

Babus Dwarka Nath Cluckerbutty and Gopal Chandra Das for the Appellant.

Sir B. C. Mitter and Babu Ramgati Sircar for the Respondents.

The judgment of the Court was as follows :

These appeals arise out of proceedings in execution of decrees.

The decrees were obtained on the 22nd May, 1908, and the 13th June, 1908, respectively. It is unnecessary to refer to the previous execution proceedings. The last execution proceedings were started on the 27th November 1916. On the 17th April 1917, the judgment-debtor put in claims which were registered under section 47 Civil Procedure Code. On the next date of hearing (28th April 1917), the decree-holder put in a petition to the following effect:— "Judgment-debtor No. 3 having raised objection to the attachment, it is necessary to file written statement and cite witnesses after obtaining copy of the objection. It is accordingly prayed that a month's time may be granted to me the decree-holder for adducing evidence against the objections of judgment-debtor No. 3." The case was adjourned to 26th May 1917 along with the miscellaneous cases (the cases under section 47). On the 26th May 1917 it was again adjourned to 23rd June 1917 and again on that day to 25th June 1917. On the 25th June, 1917, the following order was passed:—"The decree-holder's pleader stated that he will not prosecute this case any further. The execution case is dismissed for non-prosecution." The miscellaneous cases were dismissed the next day (26th June 1917).

The present application was made on the 26th April, 1920 and is *prima facie* barred by limitation. The decree-holder relied upon

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the petition made by him on the 28th April, 1917 for time as constituting a step in aid of execution, and if that is a step in aid of execution, the present application would be in time.

A question was raised whether the application dated the 28th April, 1917 was in the execution cases, or in the objection cases. But both the proceedings were held in the same Court, and the number of both the proceedings appear in the application. The execution cases were ordered to come on for hearing along with the objection cases, and it is accordingly contended that it was necessary to take steps to remove the bar to the execution by adducing evidence to meet the objections raised by the judgment-debtor.

It has been held that an application by the decree-holder to summon witnesses in a proceeding originating in a claimant's application objecting to the attachment of property in execution, is a step in aid of execution : see *Ali Mahammad v. Gur Prosad* (1). Similarly an application by the decree-holder to summon witnesses for determining the standard of measurement to meet the objections raised by the judgment-debtor to the delivery of possession of certain properties in execution has been held to be a step in aid of execution. [See *Kedar Nath Dey v. Lakhi Kanta Dey* (2)].

It is necessary to refer to similar other cases cited before us, because there was no application for adjournment in those cases. The question in this case is whether an application for time to cite witnesses to meet the objection raised by the judgment-debtor, or to do some other act, is a step in aid of execution. The decisions on the point are not uniform. For instance, in the case of *Abdul Hossein v. Fasilun* (3), an application by the decree-holder stating that he had at the request of the judgment-debtor released some of the properties attached, and asking the Court to postpone the sale, the attachment on the remainder of the property being maintained, was held not to be a step in aid of execution, as the postponement of the sale had the effect of temporarily, at all events, of retarding the execution.

In the case of *Tarak Chunder Sen v. Gyanada Sundari* (4) the learned Judges Petheram C. J. and Rampini J, observed as follows :—
"The most favourable way in which the position may be described for the decree-holder is to say that the application of the 16th of March, 1891 was an application for further time to proceed with the pending execution proceeding, and then

(1) (1883) I. L. R. 5 All. 344.

(2) (1917) 21 C. W. N. 868 ; 25-C. L. J. 115.

(3) (1892) I. L. R. 20 Calc. 255. (4) (1896) I. L. R. 23 Calc. 817 (820-21).

the question is whether, if the Court made an order granting the further time asked, such an order is a *step in aid of the execution*. "It is not necessary to do more than state the proposition to see that it is not under the Civil Procedure Code. Decrees are executed by the Court on the application of the parties and a *step in aid of execution* means a step taken by the Court towards executing the decree. The mere granting of further time to make an application or to deposit money cannot be said to be such a step, as the taking of it does not assist the Court in executing the decree or advance the execution proceeding in any way." In the case of *Kartick Nath Pandey v. Jugernath Ram Marwari* (1), the decree-holder applied for time to procure certain extracts and the next day the Court ordered him to produce the extracts in a day. On the next day, the decree-holder applied for further time which was refused and the execution case was struck off. Subsequently, the decree-holder made an application for review of the order striking off the execution. It was held that the applications for time which did not further the execution of the decree but rather retarded it, were not applications to take step in aid of execution. The application for review, however, was held to be such an application.

In the case of *Troylokya Nath Bose v. Jyoti Prokash Nandi* (2) it was held that an application by the decree-holder to postpone a sale not with a view to enable him to bring the property to sale more advantageously for him but upon other grounds is not application to take some steps in aid of execution.

On the other hand, in the case of *Mowar Narsingh v. Mowar Kali Charan* (3), it was held that an application for adjournment to enable the decree-holder to adduce evidence of service of notice under section 248 Civil Procedure Code is an application made in order to obtain from the Court an order in furtherance of the execution of the decree, and that such an application, even though refused, is a step in aid of execution.

The later cases of this Court which have been cited before us were not cases where any application for time was made and therefore have not much bearing upon the question before us.

In the Bombay High Court, however in the case of *Haridas v. Vithaldas* (4) an application for time to enable the applicant to obtain copies of decrees and judgment made after presenting a *darkhast* to execute a decree was held to be a step in aid of execution, dissenting from *Kartick Nath Pandey v. Jugernath Ram Marwari* (1). In

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(1) (1899) I. L. R. 27 Calc. 285.

(2) (1903) I. L. R. 30 Calc. 761.

(3) (1909) 14 C. W. N. 486.

(4) (1912) I. L. R. 36 Bom. 638.

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Abdul Kader v. Krishnan (1) an oral application by decree-holder for an adjournment to enable him to produce records or evidence necessary to effectively conduct the execution proceeding further was held to be an application to get an order in aid of execution.

It will appear therefore that the decisions on the point are not uniform. But we think that the question whether an application is or is not a step in aid of execution, must depend upon the circumstances of each case. In the present case the objections under section 47 were filed on the 17th April, 1917 and on the 28th April 1917, the decree-holder applied for time for obtaining copies of the objections and citing witnesses. The case was adjourned to 26th May then to the 23rd of June and again to the 25th of June. No written statement was necessary to be filed and no witness was, as a matter of fact, cited. On the 25th June, the decree-holder's pleader stated that he would not prosecute the case any further and the execution case was accordingly dismissed for non-prosecution. It became unnecessary therefore to proceed with the objection cases which were disposed of on the next day.

It is not clear whether in the Madras case cited above the decree-holder filed the "encumbrance certificate" for the production of which he applied for adjournment. In the Bombay case the decree-holder did not file the copies for the production of which adjournment was obtained. In the case of *Mowar Narsingh v. Mowar Kali Charan* (2), the application for adjournment to produce evidence of service of notice under section 248 Civil Procedure Code was refused by the Court. In all these cases the decree-holder applied for adjournment to produce some evidence which presumably could not be produced at once. In the present case, objections to the execution of the decree were filed on the 17th April, and on the 28th April, the decree-holder filed an application not for summoning witnesses, but for time to cite witnesses.

Although an application to the Court to issue summons or do some other act necessary for proceeding with the execution case or for removing a bar to the execution proceedings would be a step in aid of execution, we feel some difficulty in holding that an application for time to cite witnesses irrespective of whether the decree-holder does so or not, is a step in aid of execution. It is said that although no witness was cited in the present case the decree-holder on the 28th April intended to do so. The Court of first instance

(1) (1913) I. L. R. 38 Mad. 695.

(2) (1909) 14 C. W. N. 436.

however observed as follows : " The real object of the decree-holder is to be seen. The decree-holder applied for time but he allowed the execution cases to be dismissed for non-prosecution. So the intention of the decree-holder was to retard the execution and not to take steps in aid of execution as is now argued before us.....There was no necessity to file written statement in objection case under section 47 Civil Procedure Code. Moreover the decree-holders cited no witness and took no steps to produce their witnesses. The result was that the execution cases were dragged for two months more and dismissed for the decree-holder's default." The lower appellate Court evidently was also of the same opinion. It says : " In these appeals the application was for time to take copies to file a statement. Its effect was merely to prolong the proceedings. The decree-holder did no act and was not asking for time to perform an act enjoined either by law or by a specific direction of the Court."

Without laying down any general rule on the point, we are of opinion having regard to all the circumstances of these cases that the application for time filed by the decree-holder in the present case on the 28th April 1917 did not constitute a step in aid of execution.

It is next contended that the present application should be treated as an application in continuation of the previous application. But this question was not raised in either of the Courts below, and the application in the previous execution case is not before us. Apart from that, in the present application for execution the decree-holder applied not only for attachment and sale of the properties mortgaged, but also for attachment and sale of the other movables and immovable properties of the judgment-debtor and for the arrest of his person. In these circumstances we are unable to give effect to this contention also.

The appeals must accordingly be dismissed. We make no order as to costs.

A. T. M.

Appeals dismissed.

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CIVIL RULE.

Before Mr. Justice C. C. Ghose, and Mr. Justice Cuming.

ISHAN CHANDRA SARKAR

v.

MANMATHA NATH DUTTA.*

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July, 26.

Summary enquiry—Calcutta Rent Act (III B. C. of 1920), Sec. 20—Criminal Procedure Code (Act V of 1898), Secs. 5 (2), 29.

The President of the Calcutta Improvement Tribunal is competent to hold summary enquiry referred to in section 20 of the Calcutta Rent Act under the provisions of chapter XXII of the Code of Criminal Procedure.

Having regard to the provisions of section 29 read with section 5 (2) of the Code of Criminal Procedure, the possibility of the application of the provisions of the Code of Criminal Procedure to Courts which are not mentioned specifically in the Code of Criminal Procedure, is not excluded.

Application for Revision under section 435 of the Code of Criminal Procedure by the Petitioner.

The petitioner preferred a complaint before the President of the Improvement Tribunal against the opposite party under section 20 of the Calcutta Rent Act. The learned President declined to take any action whatsoever on the complaint on the ground that there was no procedure indicated in the Calcutta Rent Act or anywhere provided by law for holding a summary enquiry such as is referred to in section 20. The other facts appear from the judgment.

Babu Hira Lal Chakrabutty for the Petitioner.

No one for the Opposite Party.

The judgment of the Court was as follows.

This is a Rule calling on the President of the Calcutta Improvement Tribunal and the opposite party to show cause why the order of the learned President dated the 26th April 1922 should not be set aside, or such other and further order made as to this Court may seem fit.

The facts which have given rise to this application shortly stated, are as follows :—The petitioner before us is a tenant in premises 64 and 64-1 of Garpar Road within the limits of Calcutta as defined in the Calcutta Rent Act. He was let into possession of 4 rooms and a kitchen sometime in November 1918, the rent payable by him being a sum of Rs. 15 per month. It is stated that in February 1920 this rent was enhanced to Rs. 26 a month, and that in

* Civil Rule No. 22 of 1922, against the order of S. C. Banerji Esq., President of the Calcutta Improvement Tribunal, dated the 26th April, 1922.

February 1922 a further demand for a further enhancement was made by the landlord but it was refused by the petitioner. The result of the refusal on the part of the petitioner to pay further enhancement was that the petitioner's landlord namely the opposite party cut off the connection with the unfiltered water tap and forcibly dispossessed the petitioner from a room on the ground floor situated in 64-1 Garpar Road and prevented the petitioner and his family from the use of a filtered water tap in 64-1 Garpar Road and by cutting off one of the filtered water taps. These things happened on the 4th March 1922. The petitioner being thus put to very serious inconvenience and annoyance applied on the 11th March 1922 to the Controller of Rents in Calcutta for sanction to prosecute the opposite party under section 20 of the Calcutta Rent Act. The application for sanction was under the provisions of section 22 of the Calcutta Rent Act and an enquiry was made by the Controller of Rents in Calcutta. That officer came to the conclusion that the allegations made by the petitioner were substantiated to his satisfaction and he accordingly granted sanction to the petitioner to prosecute the opposite party under section 20 of the Calcutta Rent Act. Thereafter the petitioner preferred a petition of complaint before the President of the Improvement Tribunal against the opposite party under the provisions of section 20 of the Calcutta Rent Act. The learned President by his order dated the 26th April 1922 declined to take any action whatsoever on the complaint preferred by the petitioner on the ground that there is no procedure indicated in the Calcutta Rent Act or anywhere provided by law for holding a summary enquiry such as is referred to in section 20 of the Calcutta Rent Act. The learned President in the course of his judgment points out that under section 23 of the Calcutta Rent Act the Local Government was charged with the duty of making rules regulating the procedure to be followed in enquiries by the President of the Tribunal and that in the exercise of the powers vested in them under section 23 of the Calcutta Rent Act the Local Government made a rule which was rule 4 to the effect that the President of the Calcutta Improvement Tribunal in the matter of enquiries referred to in the Act should follow the Code of Civil Procedure as nearly as may be. The validity of this rule was discussed by this Court in the case of *Gobordhone Das v. Dooli Chand* (1), and it was ruled by this Court that the rule referred to above being rule 4 made by the Local Government under the provision of section 23 of the Calcutta Rent Act was *ultra vires*. It

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appears that after the date of this decision by this Court the Local Government has amended the previous rule by adding to it a proviso to the effect that in making a summary enquiry under sections 19 and 20 of the Act the President of the Tribunal shall follow as nearly as may be the procedure for conducting enquiry prescribed by the Code of Criminal Procedure. The learned President for the reasons given by him is however of opinion that the amendment made in the previous rules by the Local Government does not meet the difficulties to which attention had been previously called. In particular the learned President refers to the question as to whether having regard to the provisions of section 5 (2) of the Code of Criminal Procedure read with section 29 of that Code provision has been made by the Local Government in the rules which they have made for regulating the procedure to be followed in the summary enquiry under section 20 of the Calcutta Rent Act.

We have examined the provisions of section 20 of the Calcutta Rent Act as also the provisions of sections 5 (2) and 29 of the Code of Criminal Procedure as also the sections in Chapter XXII of the said Code, and for the reasons mentioned below, we are of opinion that the President of the Tribunal is competent to hold summary enquiry referred to in section 20 of the Calcutta Rent Act under the provisions of Chapter XXII of the Code of Criminal Procedure.

Section 5 of the Code of Criminal Procedure runs as follows :—

(1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained. (2) All offences *under any other law* shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, namely the provisions hereinafter contained as mentioned in section 5 (1), but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences. Section 29 (1) states, "Subject to the provisions of section 447, any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court."

The effect of these two sections read with section 20 of the Calcutta Rent Act is as we understand this :—A specific offence was created by section 20 of the Calcutta Rent Act. The Court which is to try the person charged with this specific offence is also mentioned in section 20 of the Calcutta Rent Act. Therefore having regard to the language of section 29 (1) Criminal Procedure Code it would appear that the offence created under section 20 of the Calcutta Rent Act shall, in the events which have happened,

namely, the Court which is to try the offence having been mentioned in section 20 of the Calcutta Rent Act, be tried by the President of the Tribunal, which is the Court mentioned in section 20 of the Calcutta Rent Act. Now let us look at section 5 (2) Criminal Procedure Code. By virtue of section 5 (2) Criminal Procedure Code an offence created "under any other law," that is, an offence created under section 20 of the Calcutta Rent Act shall be investigated, inquired, tried or otherwise dealt with according to the provisions of the Code of Criminal Procedure, but subject to any enactment for the time being in force. The proviso indicated in section 5 (2) Criminal Procedure Code need not be taken into consideration because of the fact that in the enactment which created the offence no special procedure is indicated, and therefore it is clear from the combined operation of sections 29 and 5 (2) of the Code of Criminal Procedure that the enquiry must be held according to the provisions of the Code of Criminal Procedure.

Now the question arises according to what particular provisions of the Code of Criminal Procedure is the enquiry to be held? Section 20 of the Calcutta Rent Act prescribes that the enquiry is to be a summary enquiry. Now if one turns to the provisions of Chapter XXII of the Code of Criminal Procedure one finds that provision is made there for the holding of summary trials. There cannot be any manner of distinction between a summary enquiry and summary trial, and we think the provisions of Chapter XXII Criminal Procedure Code are applicable to cases which have to be enquired into summarily as indicated in section 20 of the Calcutta Rent Act. The learned President has observed in his judgment that Chapter XXII read with Chapter XXIII Criminal Procedure Code would appear to be applicable only to the classes of Courts mentioned therein. In this connection it is to be observed that having regard to the provisions of section 29 read with section 5 (2) Criminal Procedure Code the possibility of the application of the provisions of the Code of Criminal Procedure to Courts which are not mentioned specifically in the Code of Criminal Procedure is not excluded. For the reasons given above we think the learned President should have followed the provisions of the Code of Criminal Procedure and should have held a summary enquiry for the purpose of determining the complaint preferred before him under the provisions of section 20 of the Calcutta Rent Act.

The Rule is accordingly made absolute in the terms indicated above. The petition of complaint will be sent back to the learned

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President of the Tribunal to be disposed of having regard to the observations made above.

Let the records be sent down without delay.

A. T. M.

Rule made absolute.

PRIVY COUNCIL

PRESENT : *Lord Phillimore, Mr. Ameer Ali, Sir Lawrence Jenkins and Lord Salvesen.*

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(ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.)

Mahomedan will—Construction—Legacy to heirs—consent of heirs—Onus.

A testator under the Mahomedan law cannot leave a legacy to any of his heirs unless the other heirs agree ; but any single heir may so agree as to bind his own share. Such consent must be proved by the heir claiming the legacy, and will bind only those of the heirs whose consent is proved.

Appeal from a decree of the Chief Court of Lower Burma, reversing a decree of the same Court on its Original Side.

The appellant is the eldest son and the respondent the eldest daughter of a wealthy Mahomedan in Burma. The father died in 1907, leaving a will by which he appointed the appellant as the sole executor and trustee and directed that all his (testator's) properties should be sold, that a fourth share of the proceeds should be utilised for certain specific bequests to near relatives and mosques, that the executor and trustee shall dispose of the remainder as he should think proper, that the testator's heirs should not be entitled to ask for an account from the executor regarding such disposal and that the executor shall be entitled to a commission of ten per cent on cash coming into his hands as sale proceeds. The appellant took possession of the entire estate of the testator and collected the rents and profits thereof. In May 1917, the respondent demanded that

the estate should be sold and a distribution of the proceeds to be made according to Mahomedan law. She claimed that the provision of ten per cent commission in the will was invalid as being in contravention of Mahomedan law. The appellant refused to comply with the demand and the present action was commenced in 1917. The trial Judge Mr. Justice Young held that all the adult heirs of the testator other than the respondent had consented to the provisions of the will, that the respondent had impliedly consented and that the appellant was entitled to the ten per cent commission under the will. On appeal, the Chief Court on its appellate Side held that there were no justifying circumstances to infer implied consent on the part of the respondent and decreed the respondent's claim for a distribution of the whole undisposed of estate among the testator's heirs according to law, but that the benefit of this declaration was to be confined to the respondent and the three minor defendants in the suit. The appellant preferred the present appeal.

De Gruyther K. C. and *Parikh* for the Appellant argued that the respondent had consented impliedly to the provisions of the will and that the appellant was entitled to the commission as all the adult heirs of the testator had consented to the provisions of the will.

Dunne K. C. and *Sanders* appeared for the Respondent.

The judgment of their Lordships was delivered by

Lord Phillimore : The dispute in this case arises in the course of the administration of the estate of a wealthy Mahomedan, who died on the 25th February, 1907, having left a will dated the 15th June, 1903, which was admitted to probate on the 18th March, 1908. By that will he left his only son, the defendant in this suit and the present appellant, his executor, and he gave him certain powers and professed to entitle him to a commission of 10 per cent on the proceeds of the sale of all his estate. That provision is twice over expressed, but substantially the effect is the same on the two occasions. He also, instead of reserving, as by Mahomedan law he could, one-third of his estate for his general disposition, reserved somewhat less—one-fourth, and with regard to that fourth he directed the executor, whom he described also as "executor and trustee" to pay certain charitable legacies amounting to Rs. 13,700, directing at the same time that none of his heirs or any other persons should be entitled to have any right to claim an account of his disbursements from the executor, and, with regard to the balance of the fourth

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share he gave it to the executor to spend or to dispose of in such manner as to him should seem fit and proper. This has been treated in both Courts as a legacy of the residue of the fourth share to the defendant, the present appellant.

There were various heirs, widows and children, by various families. The plaintiff and respondent now, a widow lady, was the eldest sister and of the same full blood as the defendant, appellant.

In 1917 she instituted this suit alleging that the two provisions for the benefit of her brother, namely, that giving him 10 per cent., and that giving him the balance of the fourth share, were contrary to Mahomedan law. It appeared in the course of the suit, if it had not appeared before, that several of the heirs had agreed nevertheless to the appellant retaining his interest, as, according to Mahomedan law, they could, but there remained the plaintiff, and there remained three minor children, and the contest in the suit was with regard to the plaintiff. The Mahomedan law does not allow a testator to leave a legacy to any of his heirs unless the other heirs agree, but any single heir may so agree as to bind his own share, and, therefore, when it appeared in the course of the suit that the other heirs had agreed, the only contest was as regards the plaintiff and the three minors. As regards the three minors there could be no question of their consent and the dispute therefore turned on the question whether the plaintiff had consented or not.

Now the burden of proving that consent was on the appellant, the defendant in the suit. Both parties tendered oral evidence, each putting his or her case more strongly than the trial Judge thought was correct; the plaintiff averring that she had protested from the first and had been put off by a promise that she should have her proper share (this the trial Judge did not accept); the defendant averring on the contrary that he had made quite clear to the plaintiff what the provisions of the will were, and the plaintiff, regarding him as the only male in the house, had expressed not only her consent but her pleasure that he should have this benefit. With regard to that the trial Judge found that there was oath against oath; that there was no corroboration, the only other person present being the husband of the plaintiff, who was by this time dead, and, in the end, he was not satisfied that this consent was proved. He thereupon said that there was no direct evidence of explicit consent and the question turned upon whether there was implied consent and the only two grounds of implied consent that he replied upon were delay and a certain transaction with regard to a loan and the interest upon

it. On those materials he found in favour of the defendant that there was an implied consent-

The plaintiff appealed to the Chief Court, and the Chief Court reversing the decision of the primary Judge, found that there was not sufficient evidence of an implied consent, and the learned Judges agreed with the trial Judge that there was no proof of an explicit consent.

Thereupon this appeal was brought; but, in their Lordships' opinion, unsuccessfully. The burden of proof was as already stated, upon the defendant, and the only two elements to be considered were the question of time and the question of the loan. As to the first the delay is explained because the estate was not in fact realized until after the suit—by general consent only realized in parts from time to time—and there was no such realization and no such stating of accounts, even temporary or provisional stating of accounts, as could be suggested to have shown to the plaintiff that the estate was being divided upon the footing that the defendant was to be entitled to retain these advantages, for both Courts decided that both these advantages were legacies which had to be justified.

With regard to the loan it appears that in 1908 the lady's husband wanted some money to release a mortgage on his house, and the lady, not unnaturally, went to her brother, who was collecting money from time to time and asked for some money—it was not a very large sum—to enable her to pay off this mortgage. He thereupon appears to have said that he had no money, but as the lady was pressing him and he probably felt that he was an accounting party, he offered to borrow it, but said that she would have to be surety for the loan. She was prepared to do this but demurred to paying interest. Up to that point the parties are in substantial agreement. He did borrow money; she did, jointly with him, execute the promissory note to a Chetty, and she took from her brother a letter promising her that she should not have to pay the interest. Now what was the reason of this transaction? It is suggested for the defendant that she said to him that he was taking great advantages under their father's will—more than the Mahomedan law allows, and therefore the least he could do was to pay this interest. She denies this and says that she was asking for some of the money which was coming to her, and therefore it was quite right that he should relieve her from paying this interest. Now if it had appeared that he had really relieved her from paying the interest there would be some substance in the contention, although their Lordships do

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not say there would be very much substance in it then. But, it appears that he has now debited this lady, as part of her share, with the interest on this loan. After that it becomes of less importance to consider this transaction, but, even apart from that, the transaction is far from sufficient by itself to support an implied consent. That is the view the Chief Court took, and, their Lordships think, quite rightly, and, therefore, they will humbly recommend His Majesty that this appeal should be dismissed with costs.

Mount, Sterry and Wheeler—Solicitors for Appellant.

Bramall & White—Solicitors for Respondent.

K. V. L. N.

Appeal dismissed.

PRESENT: *Viscount Cave, Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.*

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[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Oudh Estates Act (I of 1889), Section 8, List 4, Section 23—Succession—"Ordinary law"—Male primogeniture Sanad—Evidence of instances of widows' succession prior to Sanad—Crown Grants Act (XV of 1895) s. 3.

In 1863, the estate of Mahal Tajpur was granted to an ancestor of the parties under a male primogeniture sanad. The estate was entered under List 4 prepared under section 8 of the Oudh Estates Act. Intestate succession to such estates in List 4 is to be regulated by the ordinary law applicable to the parties, under section 23 of the Act. On the death of the last holder in 1907, his widow took possession of the estate as her husband died intestate: the appellant sued for possession as the last holder's heir; under the primogeniture rule of succession:

Held, (1) that the words "ordinary law" in section 23 have not the effect of displacing the rule of succession prescribed by the Sanad under which the estate is held; and (2) that, having regard to section 3 of the Crown Grants Act of 1895, evidence of widows' succeeding prior to the Sanad cannot be led to prove a custom contrary to the terms of the sanad: *Brij Indar Bahadur Singh v. Ramee Janki Koer* (1); *Musammatt Farbati Kunwar v. Rani Chandarpal*

(1) (1877) L. R. 5 I. A. 1 (13).

Kunwar and others (1) distinguished: *Narendra Bahadur Singh v. Achal Ram* (2); *Debi Bahsh Singh v. Chandrabhan Singh* (3); *Sitla Bahsh Singh v. Sital Singh and others* (4) followed. *Thakur Shob Singh v. Rani Raghubans Kunwar and another* (5) referred to.

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Appeal from a decree of the Court of the Judicial Commissioner of Oudh, affirming a decree of the Court of the Subordinate Judge of Partabgarh.

The suit was brought by the appellant to recover possession of the estate of Mahal Tajpur in Oudh on the death of the last holder intestate in 1907. The estate was granted in 1863 under a sanad which provided that, in the event of the holder dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture. The estate was also entered in lists 1 and 4 prepared under section 8 of the Oudh Estates Act. The provisions of section 23 of the Act are applicable to the estates entered in list 4. Section 23 provides that the succession in cases of intestacy shall be regulated by the ordinary law to which the members of the intestate's tribe and religion are subject to.

The question in the appeal is whether the rule of succession laid down in the sanad applied or whether the widow of the intestate was entitled to succeed under section 23 of the Act.

The appellant claimed the estate under the rule of succession laid down in the sanad. The widow resisted the action on the ground that the provision in the sanad is nullified by section 23 of the Oudh Estates Act I of 1869. The Subordinate Judge dismissed the suit, holding that the "ordinary law" referred to in section 23 did not include the provisions in the sanad and that the custom of primogeniture was not made out. On appeal, this decree was affirmed by the Court of the Judicial Commissioner. Hence the present appeal.

The facts and the reasons given by the Judicial Commissioners for the conclusions arrived at by them are fully set out in the judgment of their Lordships.

Dunne K. C. and Brown for the Appellant: It is admitted that the appellant is the nearest male heir of the deceased intestate. Under the rule of succession laid down in the sanad under which

(1) (1909) L. R. 36 I. A. 125; I. L. R. 31 All. 457; 10 C. L. J. 216.

(2) (1893) L. R. 20 I. A. 77; I. L. R. 20 Calc. 649.

(3) (1910) L. R. 37 I. A. 168; I. L. R. 32 All. 599; 12 C. L. J. 303

(4) (1921) L. R. 48 I. A. 228; 33 C. L. J. 520.

(5) (1905) L. R. 32 I. A. 203; I. L. R. 27 All. 634; 2 C. L. J. 194.

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the estate is at present held, he is entitled to succeed to the estate. The words "ordinary law" in section 22 of the Oudh Estates Act of 1869 were interpreted by the Board to include the rule of succession laid down in a primogeniture sanad : *Debi Baksh Singh v. Chandrabhan Singh* (1) ; *Sitla Baksh Singh v. Sital Singh* (2). There is no reason why the same words in section 23 should be interpreted in a different way. The *dictum* in *Brij Indar Bahadur Singh v. Janki Koer* (3) that the sanad was superseded by the Act, had no reference to estates entered in list 4. It was a case of an estate in list 2 and the case was distinguished on that ground in the later case of *Debi Baksh Singh v. Chandrabhan Singh* (1). *Parbati Kunwar v. Chandarpal Kunwar* (4) though a case under list 4, was decided on a finding as to custom. Further the rival claimants were both females and both would have been excluded under the rule of succession in the sanad. The legislature specifically put special limitations of succession to estates in list 3 : Section 22 clauses 1 to 10. Section 23 was made applicable to estates in list 4. The provisions in the sanad regulate the succession under section 3 of the Crown Grants Act of 1895 ; *Shio Singh v. Raghubans Kunwar* (5).

De Gruyther K. C. and *Dube* for the Respondents : In this case the provisions of the sanad have no application. Section 23 is clear. The title rests upon the summary settlement and not upon the sanad : See Letter of October, 10, 1859, para 2 (Schedule I to Act I of 1889). Estates entered in lists 2 and 3 are the only ones in which succession by primogeniture rule applies either by custom or the sanad. Entry in list 4 shows that the primogeniture rule does not govern the succession. The grantees could have elected under section 9 to be entered in list 3 if they wanted the sanad to apply : *Brij Indar's case* (3) and *Parbati Kunwar's case* (4) substantially support the respondents' contention. *Debi Baksh's case* (1) arose under list 5 and not under list 4.

Dunne K. C. replied.

The judgment of their Lordships was delivered by

Viscount Cave :—This is an appeal by the plaintiff in the suit from a decree of the Court of the Judicial Commissioner of Oudh affirming a decree of the Subordinate Judge of Partabgarh by

May, 12.

(1) (1910) L. R. 37 I. A. 168 ; I. L. R. 32 All. 599 ; 12 C. L. J. 303.

(2) (1921) L. R. 48 I. A. 228 ; 33 C. L. J. 520.

(3) (1877) L. R. 5 I. A. 1 (13).

(4) (1909) L. R. 36 I. A. 125 ; I. L. R. 31 All. 457 ; 10 C. L. J. 216.

(5) (1905) L. R. 32 I. A. 203 ; I. L. R. 27 All. 634 ; 2 C. L. J. 194.

which the plaintiff's suit was dismissed. The question raised is as to the title to an estate in Oudh of considerable value known as the Mahal Tajpur.

Lal Ajodhia Bakhsh, the ancestor of the plaintiff, belonged to a family of Bisen Thakurs long settled in the district of Partabgarh, and was the owner of an estate called Kundrajit or Shamsapur. At the time of the Mutiny, this family had four branches representing the descendants of the four sons of Lal Ajodhia Bakhsh; the first branch being represented by Thakurain Baijnath (a widow), the second by Lal Chhatarpal, the third by Lal Surajpal and the fourth by Lal Chandrapal. On the annexation of Oudh in 1856, this estate, with the remainder of the soil of the province, was confiscated by the British Government, which assumed the right (as stated in Lord Canning's Proclamation of the 15th March, 1858), to dispose of it in such manner as it thought fitting. Lal Chhatarpal had taken action against the British Government, but Thakurain Baijnath had been loyal; and ultimately by a sanad, which is undated but which appears from other documents to have been executed in the year 1863, the Chief Commissioner of Oudh under the authority of the Governor-General granted the estate of Kundrajit to the above-named four persons, Thakurain Baijnath, Lal Chhatarpal, Lal Surajpal and Lal Chandrapal, and their heirs, subject to the usual conditions as to the surrender of arms and loyalty to the British Government. The sanad was in the form then commonly adopted and contained the following clause:—

"It is another condition of this grant that, in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate, either in whole or in part by sale, mortgage, gift, bequest, or adoption to whomsoever you please."

Chhatarpal appears to have objected to the sanad on the ground that he was alone entitled to the whole estate, but it was ultimately accepted by him and by the other grantees.

On the passing of the Oudh Estates Act (Act I of 1869), the four grantees above named (bracketed together), were entered as owners of Kundrajit in List I and List 4, as prepared under section 8 of the Act. There appears to have been no reason why they should not have been entered in List 3 as owners of an estate regulated by the rule of primogeniture; but they may have preferred not to be subject to the special rules of succession which, under section 22 (clauses 1 to 10) of the Act, apply to estates

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entered in that List. In any case, this is now immaterial, as the estate must be dealt with according to the rules regulating estates entered in List 4.

In or about the year 1872, Kundrajit was divided into four Mahals, which were allotted to the four branches of the family, Mahal Tajpur being allotted to Chhatarpal. The effect of this partition was that this Mahal was held by Chhatarpal alone as an impartible taluq on the terms of the sanad and of the Act of 1869.

Chhatarpal died on the 19th October, 1899, and was succeeded by his son Lal Ram Kinkar. On the death of the latter without issue on the 6th October, 1907, his widow, the first respondent, Thakurain Harnam Kuar, took possession of Tajpur and the lands then held with it. Thereupon, the appellant, Babu Badri Narain Singh, who was the son of Chhatarpal's eldest brother and was the nearest male heir in line and degree, claimed to be entitled to the succession; and on his right being disputed he commenced, in 1913, the present suit against Thakurain Harnam Kuar and other members of the family for possession of Tajpur and other lands. By his plaint, he claimed possession (a) under the terms of the sanad, (b) by an alleged family custom of succession by male lineal primogeniture, and (c) under a will executed by Chhatarpal on the 6th September, 1899. This will, having been executed less than 3 months before the death of Chhatarpal, is now admitted to have been inoperative (under section 13 of the Act of 1869), to pass the estate, and it need not be further referred to.

The suit was heard by the Subordinate Judge of Partabgarh, who held that the alleged custom was not proved, and that having regard to section 23 of the Act of 1869, under which the succession on intestacy to a taluqdari estate entered in List 4 is to be "regulated by the ordinary law to which the members of the intestate's tribe and religion are subject," the succession in this case was to be regulated not by the sanad but by the law of the Mitakshara. He accordingly held that the widow of Lal Ram Kinkar was entitled to succeed, and dismissed the suit.

On appeal the Judicial Commissioners differed on the question whether the sanad applied; but they agreed in holding that there was an established custom in the family that the widow should succeed, and that this custom continued notwithstanding the forfeiture and re-grant of the estate, and they accordingly affirmed the decision of the Subordinate Judge. Against this decision the present appeal was brought.

It is not and cannot be disputed that, if the rule of succession laid down in the sanad of 1863 is to have effect, the appellant as the nearest male heir is entitled to the succession ; and in the argument for the respondents, the principal stress was laid upon the contention which prevailed with the Subordinate Judge, namely, that the effect of section 23 of Act I of 1869 was wholly to displace the rule of succession prescribed by the sanad and to substitute for it the ordinary rules of succession prevailing among Hindus who are subject to the law of the M takshara. This contention was disposed of by the First Judicial Commissioner in manner appearing by the following extract from his judgment :—

“ The meaning of the words ‘ordinary law’ has been the subject of much discussion in this case. It could not merely imply the personal law of the intestate’s tribe and religion, because the personal law applicable to Hindus and Muhammadans has, in many instances, been modified and is controlled by the Indian Statutes. In the case of Hindus, for instance, the personal law of Hindus is controlled and governed in some respects by the Caste Disabilities Removal Act (XXI of 1850), the Hindu Widows Re-marriage Act (XV of 1856), the Hindu Wills Act (XXI of 1870) and the provisions of the Transfer of Property Act (IV of 1882) and the Crown Grants Act (XV of 1895), wherever they are applicable. In the case of Muhammadans, the provisions of the Muhammadan Law are similarly controlled and governed in some respects by the Transfer of Property Act (IV of 1882), wherever they are applicable. It cannot, therefore, be said that a reference to the ‘ordinary law’ in section 23 is merely meant to imply the personal law uncontrolled by custom or acts of the Indian Legislature. As pointed out by Lord Hobhouse in a case of List 2 the effect of the 11th subsection of section 22 is simply to refer the parties to the law which would govern the descent of the property when the special provisions of the Act are exhausted and such ordinary law would include custom : *Bhai Narendra Bahadur Singh v. Achal Ram* (1). In *Parbati Kuar v. Chandrapal Kuar* (2), Lord Collins applied the same rule to a case of List 4, governed by section 23. In other words, when the special rules of succession laid down in section 22 are exhausted and section 22, clause (11) is reached, or when section 23 is applicable, the situation governing the succession has to be found apart from the Statute, that is, in the ordinary

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(1) (1893) I. L. R. 20 Calc. 649 (654).

(2) (1909) I. L. R. 31 All. 457 (474).

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law applicable as if Act I of 1869 had not been passed. That ordinary law would include not only custom but also a *sanad*, where the *sanad* contains a rule of succession which is enforceable by Statute."

Their Lordships agree with the reasoning and conclusion of the First Judicial Commissioner ; and indeed no other conclusion is consistent with the decisions of this Board in *Narendra Bahadur Singh v. Achal Ram* (1) ; *Debi Bakhsh Singh v. Chandrabhan Singh* (2), and *Sitla Bakhsh Singh v. Sital Singh and others* (3). These decisions clearly establish that the "ordinary law" referred to in the Act is the law which would govern the parties apart from the statute and includes any *sanad* giving title to the property in dispute. It is true that these decisions were rendered with reference to clause 11 of section 22, and not with reference to section 23 of the Act ; but the terms of the latter section are precisely similar to those of section 22 (11), and their Lordships see no sufficient reason for giving to them a different construction. It may be added that the Oudh Estates (Amendment) Act, 1910, has no application to this case, which arose before that Act was passed.

An argument was founded, as in the cases cited, upon the dictum of Sir Barnes Peacock in *Brij Indar Bahadur Singh v. Ranee Janki Koor* (4), that in that case "the limitation in the *sanad* was wholly superseded by Act I of 1869, and that the rights of the parties claiming by descent must be governed by the provisions of section 22 of that Act." But it must be remembered that in that case (which arose under List 2) the contest was between the female heir of the grantee (a widow) and the heir of her late husband, neither of whom could claim under the *sanad* ; and this being so, the case is no authority for the view that the effect of section 22 (11) or of section 23 of the Act, was wholly to destroy the rules of succession laid down under *sanads* which had been so recently granted. Probably the dictum means no more than this, that the Act supersedes the *sanad* where the two are in conflict. Reliance was also placed on the case of *Musammat Parbati Kunwar v. Rani Chandarpal Kunwar and others* (5), which arose under List 4 ; but that case was argued (doubtless for good reasons) without any reference whatever to the *sanad* and cannot, therefore, be taken as an authority on the question now under discussion.

(1) (1893) L. R. 20 I. A. 77.

(2) (1910) L. R. 37 I. A. 168.

(4) (1877) L. R. 5 I. A. 13.

(3) (1921) L. R. 48 I. A. 228.

(5) (1909) L. R. 36 I. A. 125.

In their Lordships' opinion this argument fails.

With regard to the question of custom, the decision of the Judicial Commissioners appears to have been founded on certain instances in which the members of the family of Lal Ajodhia Bakhsh were succeeded by their widows ; but all these instances with one exception, occurred before the forfeiture of the estate in 1856 and the grant of a new title upon the conditions laid down in the sanad ; and they cannot be used to set up a rule of succession directly contrary to the terms of the sanad under which the estate is now held. The Crown Grants Act of 1895, section 3, enacts that all provisions, &c., contained in a grant " shall be valid and take effect according to their tenor, any rule of law statute or enactment of the Legislature to the contrary notwithstanding," and full effect was given to this enactment in *Thukur Sheo Singh v. Rani Raghubans Kunwar and another* (1). The exception was in the case of the widow of Surajpal, one of the grantees under the sanad of 1863, who appears to have been allowed to take possession of his estate to the exclusion of his male heirs ; but this single instance, which is unexplained, is wholly insufficient to establish a custom binding on another branch of the family. This argument, therefore, also fails, and the appellant's title prevails.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed ; that the decree of the Court of the Judicial Commissioner and the decree of the Subordinate Judge should be set aside ; and that the appellant should be held entitled to possession of Mahal Tajpur with any accretions thereto and to an account and payment of mesne profits. The respondents will pay the costs of the appellant in both Courts and his costs of this appeal.

Douglas grant : Solicitor for the appellant :

T. L. Wilson & Co. : Solicitors for the Respondents :

K. V. L. N.

Appeal allowed.

(1) (1905) L. R. 32 I. A. 203.

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APPELLATE CIVIL

Before Mr. Justice C. C. Ghose, and Mr. Justice Chatterjee.

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December, 8, 12.

DEBI PROSAD BHAKAT

v.

OFFICIAL TRUSTEE OF BENGAL.*

Appeal—Order of remand passed by Special Judge—Landlord purchasing part of jots in execution of rent decree—Wrongful eviction.

No appeal lies against an order of remand passed by the Special Judge under the provisions of the Bengal Tenancy Act: *Mothur v. Tara Sunkar* (1), and *Mathura v. Basanta* (2) followed.

The plaintiff landlord executed a decree for rent obtained by his predecessor-in-interest and caused seven jotes held by the tenant to be sold. The jotes were divided into two jotes. The landlord purchased the jotes in the execution sale. On the objection of the tenant, the sale as regards one of the jotes was set aside. As no objection to the sale was made as regards the other one, the sale was made absolute;

Held, that there was no wrongful eviction of the tenant at the instance of the landlord. The rent decree in execution whereof the sale followed, was binding on the tenant.

Appeal by the Defendant.

Application by landlord under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rent.

The material facts appear from the judgment.

Babu Panchanan Ghose for the Appellant.

Babus Dwarka Nath Chuckerbutty and *Santosh Kumar Bose* for the Respondent.

The judgment of the Court was as follows:

December, 12.

The hearing of this appeal has taken considerable time—a fact which, however, need not be regretted by any body for we have had the pleasure of listening to an elaborate and earnest argument on behalf of the defendants tenants and nothing which the ingenuity and industry of the learned vakils for the appellant could discover in support of the position taken up in the grounds of appeal has

* Appeal from Order No. 34 of 1921, against the order of Paroda Kinkar Mukerji Esq., Additional Special Judge, 1st Court, of Midnapur, dated the 5th August, 1921, reversing the decision of Babu H. Banerjee, Revenue Officer of Midnapur, dated the 28th June, 1919, and remanding the case for trial.

(1) (1903) 7 C. W. N. 440.

(2) (1908) I. L. R. 36 Calc. 510.

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Bighas and 5 cottas, an area which formed the balance of the lands comprised in the original 7 jotes. This was sometime in 1903 and it appears that thereafter the tenants defendants had remained in possession of the last-mentioned area without payment of any rent. The landlord sometime in 1906-1907 instituted two suits for arrears of rent in respect of the lands comprised in the original 7 jotes. The tenants replied that they were not bound to pay any rent for the lands of the original 7 jotes for the simple reason that they were not in possession of a portion of those lands, namely, 68 bighas 3 cottas possession of which had been taken delivery of by the landlord after the sale in execution of the decree for the arrears of rent. It was contended on behalf of the tenants in the said two suits for arrears of rent that there had been a wrongful eviction or ouster from a portion of the lands of the original jote at the instance of the landlord and that in law there followed a complete suspension of rent; this view was given effect to by the Courts and the result was that the landlord was met with the answer that in the circumstances no claim for arrears of rent could be sustained. It is however to be observed that in the rent suits it was not brought to the notice of the Courts by either side that 68 bighas and 3 cottas had been sold in execution of a decree for arrears of rent and that the landlord had purchased the same and had taken delivery of possession thereof in satisfaction of the decree for arrears of rent. Be that as it may, it appears from the proceedings in the record-of-rights cases that in respect of 111 bighas and 5 cottas the defendants were recorded as non-mokarari permanent-tenure-holders under the plaintiff with a rent of Rs. 133-14-1½ pies. Thereupon the present plaintiff applied for settlement of fair and equitable rents under the provisions of section 105 of the Bengal Tenancy Act. He alleged that the defendants tenants were not tenure-holders but merely occupancy raiyats and he claimed an enhancement of rent under the provisions of the Bengal Tenancy Act. The defendants tenants, being encouraged by the result of the litigation in the previous rent suits put forward the contention that inasmuch as they had been evicted from a portion of the lands of the original 7 jotes, the landlord was not competent to ask the Revenue Officer to settle fair and equitable rents in respect of what may be called the balance area. The Revenue Officer declared that the defendants held a certain plot free of rent and he settled a certain sum as a fair and equitable rent in respect of the area of 111 bighas and 5 cottas being interest No. 138 in the record-of-rights. The matter was carried on appeal by the tenants defendants to the learned Special Judge

and it was held that instead of one consolidated rent for the area of 111 bighas and 5 cottas referred to above the Revenue Officer ought to fix seven jamas in respect of 7 jotes and for that purpose he directed a remand to the Revenue Officer. Against that order the present appeal has been laid and it has been, as remarked above, very strenuously argued by the learned vakil for the appellant that in the circumstances to which reference has already been made, there should follow a complete suspension of rent and that the landlord was not entitled to ask the Revenue officer to fair and equitable rents under section 105 of the Bengal Tenancy Act. Now to that, the short answer is that there was as a matter of fact no wrongful eviction whatsoever at the instance of the plaintiff landlord. The rent decree in execution whereof the sale followed was binding on the tenant defendants and in the circumstances of this particular case the long catena of cases dealing with the question of suspension of rent has no application whatsoever and the tenants defendants were not entitled to invoke the doctrine of suspension of rent in this case. It is argued however that whether the tenants defendants had any merits or not or whether the circumstances disclosed in the case attracted the doctrine of suspension of rent or not, it must nevertheless be held having regard to the result of the decision in the previous rent suits in 1906-07 that the plaintiff landlord cannot in this proceeding oppose the invocation of the doctrine of suspension of rent. In other words, it is said that he is bound by the decisions in the rent suits, which operated as *res judicata*. If this were the law it would, indeed, be very strange; but having regard to the facts of this case and having regard to the way in which the rent suits were disposed of, we are of opinion that this is not the law. In the first place, the rent suits were in respect of payments of rent for seven jotes. The present suit is for fixation of a fair and equitable rent in respect of one jote of 111 bighas and 5 cottas. In the second place, it is by no means clear on the materials before us that the original seven jotes did not cease to exist after 1903. In the third place it may be remarked that if as a matter of fact the seven jotes had already ceased to exist before the rent suits were disposed of and if as a matter of fact, on the facts of this particular case, there was no wrongful ouster at the instance of the landlord, the decisions in the rent suits could not have, in any view of the matter, been correct. We need not go into the question as to whether or not the decisions in the rent suits can operate in these circumstances as *res judicata*—a question in respect of which there is a conflict of judicial authorities. But we prefer to rest our deci-

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sion on the simple ground that on the facts as disclosed in the present proceedings the doctrine of res judicata cannot be invoked. We have thus far proceeded on the footing that an appeal lay to this Court and that such appeal has been rightly preferred ; we think however having regard to the decisions in *Mothur v. Tara Sunkar* (1) and *Mathura v. Basanta* (2), that the appeal to this Court at the instance of the tenants defendants is an incompetent appeal, because this appeal is really an appeal against an order of remand passed by the Special Judge under the provisions of the Bengal Tenancy Act. Our attention has been drawn to : *Manmatha v. Gadadhar* (3), but we think that the present case is covered by the cases of *Mothur v. Tara Sunkar* (1), and *Mathura v. Basanta* (2), rather than by the case of *Manmatha v. Gadadhar* (3). We might have disposed of this appeal on the short ground that no appeal lay to this Court, as we have just indicated, but out of respect to the argument which has been addressed to us, we have preferred to dispose of the appeal after considering all the points that had been addressed to us.

The result is, that this appeal fails and is dismissed with costs—
hearing fee, three gold mohurs.

A. T. M.

Appeal dismissed.

(1) (1903) 7 C. W. N. 440.

(2) (1908) I. L. R. 36 Calc. 510.

(3) (1917) I. L. R. 45 Calc. 638.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Rankin.

CHANDRAKISOR DATTA MAJUMDAR

v.

KUMAR UPENDRA CHANDRA CHAUDHURI AND OTHERS.*

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February, 27, 28.
March, 1, 2, 5, 9.

Alienation—Hindu widow—Claim by purchase—Legal necessity—Recital in conveyance—Evidence—Burden of proof—Lapse of time—Enquiry—Smaller amount would have been sufficient to avert the pressure.

When a person claims title under an alienation effected by a Hindu widow in respect of the estate of her husband, the burden lies upon him to establish either that there was legal necessity in fact which justified the alienation, or that he made proper and *bona fide* enquiries and did all that was reasonable to satisfy himself as to the existence of such necessity: *Bhagwat v. Debi* (1) and other cases. In the application of this rule, it is to be borne in mind that recitals in conveyances or mortgages of the existence of legal necessity are not by themselves evidence of the fact, and there must ordinarily be some evidence *altunde* to substantiate the allegations: *Brij Lal v. Inda Kunwar* (2), and *Vasonji v. Chanda Bibi* (3). Though lapse of time does not affect the question of onus of proof regarding legal necessity, it may give rise to a presumption of acquiescence or save the alienee from adverse inferences arising from the scantiness of the evidence offered on his behalf. In other words, when by efflux of time, direct evidence independent of the recital becomes unavailable, a recital of necessity, consistent with probability and the circumstances, assumes greater importance; it is clear evidence of a representation to the purchaser, and when evidence of actual enquiry by him has become impossible, the recital coupled with circumstances which justify a reasonable belief that an enquiry would have confirmed its truth, is sufficient evidence to support the transaction: *Chintamanibhatla v. Rani of Wadhwan* (4).

If the transaction was in the main for legal necessity, it would not be impeachable on the ground that a smaller sum might have been sufficient to remove the pressure at the time: *Medai v. Nainar* (5).

Appeal by the Plaintiff.

Suit for possession.

The material facts appear from the judgment.

*Appeal from Original Decree No. 264 of 1920, against the decree of Babu Bamandas Mookerjee, Subordinate Judge of Mymensingh, dated the 25th September, 1920.

(1) (1907) L. R. 35 L. A. 48; I. L. R. 35 Calc. 420; 7 C. L. J. 335.

(2) (1914) I. L. R. 36 All. 187 P. C.; 19 C. L. J. 469 P. C.

(3) (1915) I. L. R. 37 All. 369 (376); 22 C. L. J. 180.

(4) (1919) L. R. 47 I. A. 6; I. L. R. 43 Mad. 541.

(5) (1922) 27 C. W. N. 365 P. C.

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March, 9.

Babus Joges Chunder Roy, Gobinda Chandra Dey Roy, Annada Charan Karkun and Pramatha Nath Banerjee for the Appellant.

Babus Dwarka Nath Chuckerbutty, Satis Chandra Bhattacharyya and Rama Prosad Mookerjee for the Respondents.

C. A. V.

The judgment of the Court was delivered by

Mookerjee, J : The subject matter of the litigation which has culminated in this appeal is one-fifth share in immovable properties described in the schedule to the plaint, which formed part of the estate of one Kamal Narain Nandy Chowdhury who died on the 26th December, 1853. He left a widow, Parmeshwari Chowdhurani, who died on the 22nd September, 1913. The present suit was instituted on the 20th September 1918 by Chandrakisor Datta Majumdar, the son of a sister of the original proprietor, who claimed title to the estate of his maternal uncle as the sole surviving reversionary heir. The claim was resisted by Upendra Chandra Chaudhury and his wife on the basis of purchase at a sale held in execution of a mortgage decree. It appears that on the 28th July, 1880 Parmeshwari, along with other members of the Nandy Chowdhury family, had executed a mortgage in favour of Harendra Lal Roy Chowdhury to secure a loan of Rs. 16,500 on the security of the properties inherited by her from her husband. The loan was not repaid in due course, with the result that the mortgagee instituted a suit on the 19th December, 1887 to enforce his security, obtained the usual mortgage decree on the 4th June, 1888 and brought the hypothecated properties to sale on the 20th August, 1889 when the first defendant became the purchaser. The question consequently arises whether the sale so brought about binds the inheritance claimed by the plaintiff as the reversionary heir to the estate of his maternal uncle. The defendants successfully urged in the Court below that the question should be answered in the affirmative. They further argued—and their contention found favour with the Subordinate Judge—that Kamal Narain, on the day previous to his death, executed in favour of Parmeshwari a document called an Anumati Patra which in the events that have happened effectively excluded the plaintiff from the line of succession as reversionary heir. On the present appeal the plaintiff has reiterated the contentions which were found untenable by the trial Court.

It is well-settled that when a person claims title under an alienation effected by a Hindu widow in respect of the estate of her

husband, the burden lies upon him to establish either that there was legal necessity in fact which justified the alienation, or that he made proper and *bona fide* enquiries and did all that was reasonable to satisfy himself as to the existence of such necessity. This position is supported by the decisions of the Judicial Committee in *Bhagwat Dayal v. Debi Dayal* (1); *Amarnath v. Achan Kuar* (2) and *Nabakishore v. Upendrakishore* (3). In the application of this primary rule, it is to be borne in mind that recitals in conveyances or mortgages of the existence of legal necessity are not by themselves evidence of the fact, and there must ordinarily be some evidence to substantiate the *aliunde* allegations: *Brij Lal v. Inda Kunwar* (4); *Vasonji v. Chanda Bibi* (5). The inflexible application of this view may and does in fact place the alienee at a serious disadvantage when the transaction falls to be challenged after a long series of years. Hence it has been ruled that though lapse of time does not affect the question of onus of proof regarding legal necessity, it may give rise to a presumption of acquiescence or save the alienee from adverse inferences arising from the scantiness of the evidence offered on his behalf. To put the matter in another way, when by efflux of time, direct evidence independent of the recital becomes unavailable, a recital of necessity, consistent with probability and the circumstances, assumes greater importance; it is clear evidence of a representation to the purchaser, and when evidence of actual enquiry by him has become impossible, the recital coupled with circumstances which justify a reasonable belief that an enquiry would have confirmed its truth, is sufficient evidence to support the transaction; see *Chintamanibhatla v. Rani of Wadhwan* (6), where the Court was invited to investigate the circumstances of a transaction which had taken place more than eighty two years before the initiation of the suit; see also *Banga Chandra v. Jagat Kishore* (7); *Ravaneshwar v. Chandi Prasad* (8), which affirms *Ravaneshwar v. Chandi Prasad* (9). The Subordinate Judge, we are satisfied, has kept these principles in view in the course of his examination of the evidence adduced in this case.

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(1) (1907) L. R. 35 I. A. 48; I. L. R. 35 Calc. 420; 7 C. L. J. 335.

(2) (1892) L. R. 19 I. A. 196; I. L. R. 16 All. 420.

(3) (1921) 35 C. L. J. 116; 26 C. W. N. 312 P. C.

(4) (1914) I. L. R. 36 All. 187 P. C.; 19 C. L. J. 469.

(5) (1915) I. L. R. 37 All. 369 (376) P. C.; 22 C. L. J. 180.

(6) (1919) L. R. 47 I. A. 6; I. L. R. 43 Mad. 541.

(7) (1916) L. R. 43 I. A. 249; I. L. R. 44 Calc. 36.

(8) (1915) I. L. R. 43 Calc. 417 P. C.

(9) (1911) I. L. R. 38 Calc. 721.

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The mortgage bond which was executed by Parmeshwari on the 28th July, 1880, and which ultimately led up to the sale held on the 20th August, 1889 contains an elaborate recital of previous transactions which rendered necessary the loan of Rs. 16,500. References are made to a mortgage bond of Purna Chandra Chowdhury, a mortgage bond in favour of Haromohan Bose, a mortgage bond in favour of Gobinda Chandra Chowdhury, a bond in favour of Krishnamangal Chakravarti, a bond in favour of Mohasukh Agusti, a debt of Kunja Debi, a debt of Sarat Chandra Sarkar, a debt of Brindaban Chandra Sahu, a debt of Ananda Mohan Majumdar and arrears of rent due to Jagat Kishore Acharyya Chowdhury. Most of these creditors had established their claims by suits in Court and had obtained decrees which had been put into execution. The loan was taken by the members of the family jointly to enable them to satisfy these debts, and the transaction was regarded as one needed for the protection of the joint family estate. The appellant has urged, however, that this is not sufficient to establish the validity of the claim put forward by the purchaser, and that he is bound to trace the history of each of the previous transactions so as to show by documentary evidence that each constituted a legal necessity binding upon the inheritance. The respondent has pointed out, on the other hand, that as the judicial records have been destroyed under statutory rules, detailed information of this character cannot be made available even, if it be assumed that such documentary proof is needed to fulfil the requirements of the rule. He has urged further that a substantial body of oral evidence was adduced at the trial, so as to leave no room for doubt that the loan was contracted under circumstances which constituted legal necessity and that the lender satisfied himself on this point after due enquiry. In our opinion, it is not necessary to consider the abstract question whether the whole chain of transactions must be traced back to the beginning notwithstanding the contrary opinion indicated in *Sheoraj Koor v. Nukchedes Lal* (1) and *Mahabir Kower v. Jubha Singh* (2); for, notwithstanding lapse of time, we have abundant proof oral and documentary, of the history of the family for many years past. After the death of Kamal Narain on the 26th December, 1853, the present plaintiff, along with his brother and cousin, instituted a suit in 1861 against their maternal aunt Parmeshwari for declaration that she had never been legally married to Kamal Narain and was consequently not entitled either to take his estate by right

(1) (1870) 14 W. R. 72.

(2) (1871) 8 B. L. R. 38; 16 W. R. 221.

of inheritance or to adopt a son under the authority conferred by the Anumati Patra. The members of the Nandi Chowdhury family were all joined as defendants in the action. After a protracted trial, the suit was dismissed by the Principal Sadar Ameen on the 17th September, 1862. His decree was affirmed by the District Judge on the 25th February 1863 and a second appeal to this Court was dismissed on the 9th May 1864. The judgment of the Principal Sadar Ameen shows clearly that Kamal Narain had left debts and that creditors enforced their claims against Parmeshwari who was consequently obliged to satisfy the judgment debts. There is also oral evidence to show that the result of the litigation commenced by the plaintiff against his maternal aunt and her co-sharers was to involve the family in heavy expenditure. Mathura Narain, the surviving son of a first cousin of Kamal Narain, who was himself a defendant in that litigation, has been examined as a witness on behalf of the plaintiff. He was also a defendant in two suits instituted by the plaintiff in 1915 for recovery of properties of his maternal uncle other than those included in the present suit. In those suits, Mathura Narain, jointly with his co-sharers, filed written statements, which narrated with considerable fullness the history of the transactions of the family from the time of the death of Kamal Narain. Mathura Narain has, in the present suit, affirmed the truth of the statements made by him in the previous litigations, and we see no reason why he should not be believed. The evidence of Mathura Narain shows that Kamal Narain died indebted, that the suit instituted by the plaintiff to contest the validity of the marriage of Parmeshwari led to additional debts, and that the position of the family became so embarrassed that collection of rent was seriously impeded. In such circumstances, though the Nandi Chowdhuries managed to pay the Government dues to avert a complete destruction of the family estate by sale for arrears of revenue, the rent payable to the superior landlords fell into arrears. The estate gradually became involved in debts which carried interest and were renewed from time to time. We need not set out here at length the story as narrated by Mathura Narain, which leaves no doubt in our mind that the trouble was traceable, not merely to the debts left by Kamal Narain, but also to the heavy expenses of the litigation commenced by the plaintiff and the inevitable troubles consequent thereon. In such circumstances, it is not necessary to determine whether the estate might have been kept free from debts by prudent management : *Maheshar v. Ratan* (1) ; *Dharam Chand v. Bhawani*

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(1) (1896) L. R. 23 I. A. 57 ; I. L. R. 23 Calc. 766.

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Mookerjee, J.

Misra (1); *Tika Ram v. Deputy-Commissioner of Bara Banki* (2). There is further direct oral evidence to show that the lender acted *bona fide* and enquired into the necessities for the loan. On this part of the case, we see no reason to distrust the testimony of Umes Chandra Sarkar, who pledged his oath that he along with other officers of his master, the lender, made enquiries as to the debts, the mortgages, the decrees and the properties of the borrowers. This oral evidence lends support to the theory that the detailed recitals inserted in the mortgage bond did in fact constitute the representations which on the occasion were made to the creditor. This would be sufficient to make the transaction binding upon the inheritance: *Hunoomanpersaud v Babooe Munraj* (3); *Kameshwar v. Ran Bahadur* (4); *Rameswar v. Provabati* (5); *Ramis v. Sasi* (6); *Stevens v. Janki Ballabh* (7). We may further point out that if the transaction was, in the main for legal necessity, as it unquestionably was, it would not be impeachable on the ground that a smaller sum might have been sufficient to remove the pressure at the time: *Medai Dalavoi v. Nainar Tevan* (8). We hold accordingly that the Subordinate Judge has correctly found that there was legal necessity for the mortgage and that the creditor satisfied himself as to the existence of necessity by proper and adequate enquiry.

In view of our conclusions upon the question of legal necessity and the enquiry, it is not necessary to deal at length with the point raised in the sixth issue, namely, the legal effect of the Anumati Patra alleged to have been executed by Kamal Narain in favour of Parmeshwari on the 25th December, 1853. It cannot be disputed that such a document was in fact executed. Indeed the plaintiff instituted the suit of 1861 for recovery of possession of the estate of his maternal uncle upon cancellation of the Anumati Patra. The main question in controversy is whether the contents of the Anumati patra have been proved by legal evidence. There were two Anumati Patras executed by Kamal Narain, one on the 9th March, 1851 in favour of his wife Sonamoni, the other on the 25th December 1853 in favour of Parmeshwari whom he married after the death of Sonamoni. The second document incorporates in substance the

(1) (1897) L. R. 24 I. A. 183; I. L. R. 25 Calc. 182.

(2) (1899) L. R. 26 I. A. 97; I. L. R. 26 Calc. 707.

(3) (1856) 6 M. I. A. 393.

(4) 1880 I. R. S I. A. 8; I. L. R. 6 Calc. 843.

(5) (1914) 20 C. L. J. 23.

(6) (1919) 30 C. L. J. 56.

(7) (1913) 19 C. W. N. 80.

(8) (1922) 27 C. W. N. 365 P. C.

terms of the first. Both the deeds were produced in the litigation of 1861. Since then the originals have disappeared; but copies are in existence and have been produced. As to one set of copies, the question has been raised whether they are copies of copies and consequently inadmissible under the provisions of the Indian Evidence Act. As to another set, no such difficulty, however, arises, and we accept the allegation of Umes Chandra Sarkar that he made accurate copies from the originals. We also accept the version of Aswini Kumar Banerjee who was able to narrate the contents from memory. There is further no doubt that the Subordinate Judge has correctly held that the plaintiff has withheld the copies which he obtained when the suits of 1915 were compromised. It is significant that the registration office at Mymensingh was destroyed by fire in 1917, and the plaintiff probably was under the impression that as the records had been burnt, a certified copy could no longer be procured from the Registration office. He was evidently not aware that accurate copies were in existence and were accessible to the defendants. There is, in our opinion, ample evidence, oral and documentary, as to the contents of the Anumati Patras. As regards their legal effect, the plaintiff appears to have correctly appreciated the situation in the suit of 1861, when he asserted that the stipulation contained in the Anumati Patra was that if Parmeshwari did not take a son in adoption, the property would pass into the hands of the defendants in that litigation. There is really no room for argument on the terms of the Anumati Patra that if the widow should die without taking a son in adoption, the estate would vest entirely in the family idols, whose worship would be managed by the shebaita specified. The plaintiff is not in the line of shebaita, and in this view the present suit is liable to dismissal as instituted by a person no way interested in the estate. We need not, however, discuss the matter further from this point of view nor investigate the position, if the debutter should turn out to be, not a dedication of the completest character but rather the creation of a religious charge: *Jagadindra v. Hemanta Kumari* (1). We hold accordingly that the Subordinate Judge has rightly dismissed the suit and this appeal must be dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1904) L. R. 31 I. A. 203 (209); I. L. R. 32 Calc. 129.

CIVIL.

1923.

Chandrakisor

v.

Kumar Upendra.

Mookerjee, J.

CRIMINAL REVISION.

Before Mr. Justice Newbould and Mr. Justice Sukrawardy,

CRIMINAL.

1923.

February, 22.

GANESH SAHU

v.

EMPEROR.*

Trial, second—Criminal Procedure Code (Act V of 1898), Sec. 403—Possession of several articles of stolen property—Acquittal on prosecution in respect of some—Prosecution, if can be had, for other articles—Different owners—Time.

A person was found in possession of several articles of stolen property. He was acquitted in respect of some of them for which he was prosecuted. The different articles were stolen from different persons but there was no evidence that they were received at different times :

Held, that he could not be tried in respect of other property found in his possession on the same date and a second trial was illegal under section 403 of the Code of Criminal Procedure : *Queen-Empress v. Makhan* (1) followed.

Application for Revision under section 435 of the Code of Criminal Procedure by the Accused.

The petitioner was convicted under section 411 I. P. C. on the charge of having been in dishonest possession of stolen property.

Babus Dasarathi Sanyal and *Lalit Mohan Sanyal* for the Petitioner.

Mr. Orr (Deputy Legal Remembrancer) for the Crown.

The judgment of the Court was as follows :

February, 22.

The petitioner in this case has been convicted under section 411, Indian Penal Code on the charge of having been in dishonest possession of stolen property on the 7th December, 1921. It appears that on that date several articles of property were found in the room occupied by the petitioner. In respect of some of them he was prosecuted and after being convicted under section 411 Indian Penal Code by the trying Magistrate he was acquitted on appeal. He has now been tried and convicted in respect of other properties found in his possession on the same date. There was evidence that the different articles which were the subject of the charges in the two trials were stolen from different persons, but there is no evidence that they were received at different times. The facts of

* Criminal Revision No. 1128 of 1922.

(1) (1893) I. L. R. 15 All. 317.

the case cannot be distinguished from those of *Queen-Empress v. Makhan* (1) which follows the decision of a Divisional Bench of this Court in *Ishan Muchi v. Queen-Empress* (2). On this authority we hold that the second trial was illegal under the provisions of section 403 Criminal Procedure Code.

We accordingly make this rule absolute and set aside the conviction and sentence passed on the petitioner and direct that he be discharged from his bail bond.

A. T. M.

Rule made absolute.

(1) (1893) 1. L. R. 15 All. 317. (2) (1888) 1. L. R. 15 Calc. 511.

Before Mr. Justice Newbould and Mr. Justice Suhrawardy.

HARI SATYA BISHNU AND OTHERS

v.

KING-EMPEROR.*

CRIMINAL.

1923.

January, 1923.

Trial—Cognizance of case by different Magistrates.

Per Newbould J: The law prevents a person being tried twice for the same offence. But if cognizance is taken by two different Magistrates at different times, the trial can proceed before either of the Magistrates who have taken cognizance irrespective of the one having taken cognizance before or after the other.

Application under section 435 of the Code of Criminal Procedure.

The Court of Sessions committed the petitioners to take their trial on charges under sections 420 and 120 (B) Indian Penal Code.

The material facts appear from the judgment of Newbould J.

Babu Manmatha Nath Mukherjee for the Petitioners.

Messrs. B. L. Mitter (Standing Counsel) and *S. Sen (Counsel)* for the Crown.

The following judgments were delivered :

*Criminal Revision No. 985 of 1922, against the order of the District Magistrate of Howrah, dated the 10th October, 1922.

CRIMINAL.

1923.

Han Satya

King-Emperor.

January, 12.

Newbould J: The two petitioners have been committed for trial on the charge of conspiring to commit the offence of cheating punishable under section 120 B and section 420 Indian Penal Code. The Rule is to show cause why that commitment should not be quashed on the ground that the offence of conspiracy having already been taken cognizance of by Mr. B. N. Mukherjee, Deputy Magistrate no other Magistrate had jurisdiction to take cognizance of it again so long as Mr. B. N. Mukherjee was in seisin of the case, and therefore the proceedings before the learned District Magistrate have been wholly *ultra vires* and are fit to be set aside.

It appears that on three separate police reports Mr. B. N. Mukherjee took action against the petitioners and others in respect of this conspiracy and required them to give bail to answer the charge. The cases before Mr. B. N. Mukherjee remained pending and no evidence was taken up to the 28th June. On the 28th June a formal complaint was laid before the District Magistrate by the police charging the petitioners and other persons with being members of this conspiracy and on that complaint the District Magistrate took proceedings which ended in the commitment of these petitioners to the Court of Sessions. On the day when the District Magistrate took cognizance of this complaint Mr. B. N. Mukherjee passed an order which amounted to a discharge of the persons who were appearing before him in the cases of which he had taken cognizance in connection with this conspiracy.

We are unable to hold that there is any illegality in the District Magistrate taking cognizance of the case which would justify us in quashing this commitment on a point of law. In the first place it must be remembered that no prejudice against the petitioners has been alleged and it would appear that it was rather to their benefit that the case against them should be dealt with in one single proceeding rather than before the Deputy Magistrate in three separate proceedings. We have not been shown there is any provision of the Criminal Procedure Code which prevented the Magistrate from taking cognizance of the offence because another Magistrate had previously taken cognizance. The law prevents a person being tried twice for the same offence. But there is no provision that if as in this case cognizance is taken by two different Magistrates at different times the trial can be before one of them only. There seems to be no reason why the trial should not proceed before either of the Magistrates who have taken cognizance irrespective of the one having taken cognizance before or after the other. The only section of the Code which in any way renders duplicate proceedings illegal

is section 403 which has no application whatever to the present case. But multiplicity of trials can be always prevented by the sections providing for the transfer of cases. But here is no question of multiplicity of trials. There has been only one trial, and unless the District Magistrate's action in taking cognizance was in itself illegal there was no illegality in that trial. I hold that there was no illegality in the part of the District Magistrate in taking cognizance of the case and therefore there is no ground for quashing the commitment. The Rule is discharged.

Suhrawardy J. I agree in the order proposed to be passed. I wish to add that I am not convinced that the complaint which was subsequently filed before the District Magistrate was for all practical purposes the same as that which was filed and taken cognizance of by the Deputy Magistrate.

A. T. M.

Rule discharged.

Before Mr. Justice Newbould and Mr. Justice Suhrawardy.

DARAJUDDIN AKANDA AND ANOTHER

v.

KING-EMPEROR.*

Kidnapping—Penal Code (Act XLV of 1860), Sec. 363—Mahomedan minor girl—Custody of husband.

In the absence of any evidence that a lawful guardian entrusted the custody of a Mahomedan minor girl to her husband, a person cannot be convicted for kidnapping her from the custody of her husband.

Under the Mahomedan law, in the absence of the mother, mother's mother is the lawful guardian of a girl who has not attained puberty; the husband is not the lawful guardian of her person.

Application for Revision under section 435 of the Code of Criminal Procedure.

The petitioners were convicted under section 363 of the Indian Penal Code. The petitioner Darajuddin was the maternal uncle of the minor. The girl was a Mahomedan girl whose age accord-

*Criminal Revision No. 1123 of 1922, against the order of C. Bartley Esq., Sessions Judge of Dinajpur, dated the 25th November, 1922, affirming that of Babu R. M. Chakraverty, Deputy Magistrate of Dinajpur, dated the 14th August, 1922.

CRIMINAL.

1923

Hari Satya

King-Emperor.

Newbould, J.

CRIMINAL.

1923.

February 21.

CRIMINAL.

1923.

Darajuddin

v.

King-Emperor.

ing to the case for the prosecution was 8 or 9 years and according to the defence about two years less. Her mother died sometime ago, and in the month of pous last, her maternal uncle gave her in marriage to his nephew Shamsheer Ali. On the 17th January last, according to the prosecution, the two petitioners and others came to the house of the husband, and carried away the wife by force. She was found by the police in the house of the petitioner Darajuddin. The petitioner Darajuddin admitted that he took her from her husband's house.

Babus Bimal Chandra Das Gupta and Debendra Narain Bhattacharjee for the Petitioners.

No one for the Opposite Party.

The judgment of the Court was as follows :

February, 21.

The petitioners have been convicted of kidnapping a girl named Sahya Khatun from lawful guardianship and sentenced under section 363 Indian Penal Code to two months rigorous imprisonment each. The girl in question is a Mahomedan girl whose age according to the case for the prosecution is 8 or 9 and according to the defence about two years less.

This Rule is granted on the ground that the husband of the girl from whose care she was taken was not her lawful guardian under the Mahomedan law, nor was he proved to have been lawfully entrusted with the care or custody of the minor so as to make the explanation to section 361 Indian Penal Code applicable. We hold that the Rule must be made absolute on this ground. The husband of a Mahomedan girl who has not attained puberty is not the lawful guardian of her person under the Mahomedan law. The lawful guardian of such a person is ordinarily her mother, and in the present case since the mother is dead the lawful guardian is the mother's mother who is also the mother of the petitioner Darajuddin. The learned Magistrate in his explanation states that the minor girl was in temporary guardianship of her husband on behalf of his maternal grandmother who was the lawful guardian. But there is no finding in either of the judgments, nor do the facts seem to support the view that the maternal grandmother entrusted the girl's husband with the care or custody of the minor.

That being so we make this Rule absolute. We set aside the conviction of and the sentence passed on the petitioners, we acquit them of the charge under section 363 Indian Penal Code and direct that their bail bonds be discharged.

A. T. M.

Rule made absolute.

CRIMINAL REFERENCE.

Before Mr. Justice Newbould, and Mr. Justice Suhrawardy.

GIRIDHAR SARKAR AND OTHERS

v.

HARISH CHANDRA CHOWDHURY.*

CRIMINAL.

1923.

January, 24.

Presumption—Evidence Act (I of 1872), Sec. 114 (e)—Sheristadar signing processes 'by order'—Civil Procedure Code (Act V of 1908), O. 21 R. 24 (2).

Warrants of attachment of the movable property in pursuance of decrees were entrusted to a peon of the civil Court for execution; they were signed by the sheristadar who purported to make that signature 'by order':

Held, that presumption under section 114 (e) of the Evidence Act could be applied and the statement that appeared in the face of the warrant that the sheristadar signed 'by order' could be presumed to be true and that in the absence of anything to suggest the contrary, he was actually the officer to sign processes as required by clause 2 of rule 24 order 21 of the Code of Civil Procedure: *The Deputy Legal Remembrancer v. Mir Sarwar Jan* (1) distinguished.

Reference under section 438 of the Code of Criminal Procedure.

The accused Giridhar Sarkar and five others were convicted under section 186 Indian Penal Code and sentenced each to undergo rigorous imprisonment for one month.

The material facts appear from the following
Order of Reference.

The petitioners have been convicted under section 186 Indian Penal Code in the undernoted circumstances.

Warrants of attachment of the movable property of two of them, in pursuance of decrees, were entrusted to a peon of the civil Court for execution. The warrants purport to be signed by the officiating Sheristadar of the Court, and there is nothing on the record to show that he was authorised to sign them on behalf of the Munsif.

The peon attached some cattle belonging to the judgment-debtors, and made them over to two servants of the decree-holder, from whom the petitioners and others rescued them.

I am of opinion that the conviction is bad in law.

* Criminal Reference No. 159 of 1922, by C. Bartley Esq., Sessions Judge of Dinaipur, dated the 20th November, 1922, recommending reversal of the order of Babu R. M. Chakraverty, Deputy Magistrate of Dinaipur, dated the 7th August, 1922.

(1) (1902) 6 C. W. N. 845,

CRIMINAL.

1923.

Giridhar

v.

Harish.

It had been held, in the case of *Deputy Legal Remembrancer v. Mir Sarwar Jan* (1), that where a warrant purports to be signed on behalf of the presiding officer of a Court by a person appointed to do so, there should be evidence, either on the face of the signature itself or otherwise, to prove the appointment. In that case a warrant of arrest, issued under the corresponding section of the old Code, was held not to be good warrant, and a conviction for resisting its execution was set aside.

I am therefore of opinion that in the present case, the conviction under section 186 Indian Penal Code cannot stand. I accordingly refer the matter for the consideration of the Hon'ble Judges with the recommendation that the conviction be quashed and a retrial directed in accordance with law.

Babu Indu Prokash Chatterjee for the Accused.

Babus Manmatha Nath Mukherjee and *Satindra Nath Mukherjee* for the Complainants.

January, 24.

The judgment of the Court was as follows :

The facts of the present case can be distinguished from the facts of the case cited by the learned Sessions Judge in his letter of reference namely the case of *The Deputy Legal Remembrancer v. Mir Sarwar Jan* (1). In that case the warrant signed by the Sheristadar did not show on the face of it that the Sheristadar had signed in the exercise of the authority delegated to him by the Judge. But here we find that the Sheristadar who signed the warrant purported to make that signature "by order." We think therefore that the presumption under section 114 (e) of the Evidence Act can be applied to the present case, and we hold that the statement that appeared in the face of the warrant that the Sheristadar signed "by order" can be presumed to be true, and that we should hold, in the absence of any thing to suggest the contrary, that he was actually the officer appointed by the Court to sign processes as required by clause 2 of rule 24, order XXI Civil Procedure Code.

We accordingly refuse to accept this Reference and direct that the papers be returned. The accused must surrender to their bail and undergo the unexpired portion of their sentence.

A. T. M.

Reference refused.

(1) (1902) 6 C. W. N. 845.

APPELLATE CIVIL:

*Before Sir Nalini Ranjan Chatterjea, Knight, Judge,
and Mr. Justice Cuming,*

ANNADAMOYI DEBI AND OTHERS

v.

SAUDAMINI DEBYA.*

CIVIL.

1922.

December, 13, 1922.

Interest—Bengal Tenancy Act (VIII of 1885), Sec. 67—High rate of interest—Kabuliat executed before the passing of the Act.—Holding purchased in execution of rent sale.

Section 67 of the Bengal Tenancy Act is applicable to the case of arrears of rent of a holding purchased in execution of a rent decree for arrears of rent accrued after the coming into force of the Act, of the holding of the tenant, who entered under a kabuliat executed before the passing of the Act, which stipulated interest at the rate of 75 per cent per annum on arrears of rent: *Kali Aash v. Trai-lokhyia* (1), followed: *Raj Narain v. Panna* (2); *Tiluk v. Jasada* (3); *Madhu v. Alfasuidi* (4), and *Abdul Hamid v. Abdul Miji* (5) distinguished.

Appeal by the Plaintiffs.

Suit for arrears of rent.

The material facts appear from the judgment.

Dr. Sarat Chunder Basak and *Babu Bepin Chunder Basu* for the Appellants.

Babus Brojo Lal Chakravarty and *Susil Kumar Bose* for the Respondent

The judgment of the Court was as follows:

The only question involved in this appeal is whether the plaintiff landlord is entitled to interest on overdue instalments at the rate of 75 per cent. per annum.

The Court of appeal below has found that interest at 75 per cent is an unusual and exorbitant rate and that it was an unconscionable bargain at its inception. It accordingly allowed simple interest at 12 ½ per cent. per annum.

* Appeal from Appellate Decree No. 2929 of 1920, against the decree of M. C. Ghosh Esq., District Judge of Backergunj, dated the 25th September, 1920, modifying the decree of Babu Charu Chandra Bose, Additional Munsif of Perozpur, dated the 30th July, 1919.

(1) (1899) I. L. R. 26 Calc. 315.

(2) (1902) I. L. R. 30 Calc. 213.

(3) (1906) 11 C. W. N. 215.

(4) (1909) 13 C. W. N. 962.

(5) (1916) 32 I. C. 710.

December, 13.

CIVIL.

1922.

Annadamoyl
v.
Saudamini.

The plaintiff has appealed to this Court and it is contended that as the kabuliati was executed in May 1882 before the passing of the Bengal Tenancy Act, the defendant is liable to pay interest at the rate stipulated in it.

No doubt, the kabuliati having been executed prior to the passing of the Bengal Tenancy Act, the provisions of section 67 are not applicable to the case; but the defendant purchased the holding at a sale for arrears of rent held at the instance of the landlord, the plaintiff. As a purchaser at the rent sale, the defendant purchased it with the ordinary incidents of a tenancy.

It was pointed out by Banerji J. in the case of *Kali Nath Sen v. Trailokhya Nath Roy* (1), that "a stipulation for the payment of interest at an unusual and an exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent" and again "the distinction between usual and unusual terms of a contract of tenancy is a distinction which should be taken into consideration in determining whether the incident in question continues to attach to the tenancy notwithstanding its sale for arrears of rent, and it is a distinction which has been given effect to by this Court in certain cases of which I may refer to the following namely, *Deendyal Paramanick v. Juggeshur Roy* (2), and *Alim v. Satis Chandra Chaturdhuri* (3).

On behalf of the appellant, we have been referred to the case of *Raj Narain Mitter v. Panna Chand Sing* (4), where the auction-purchaser of a durputni tenure was held to be bound by the stipulation contained in the durputni lease as to the payment of interest on arrears of rent, such a stipulation where there is nothing unusual in it being part of an ordinary incident of a tenure.

It was also held that the auction-sale of a tenancy does not involve any new contract between the auction purchaser and the landlord—a question upon which an opinion was expressed by one of the judges (Rampini J.) in the case of *Kali Nath Sen v. Trailokhya Nath Roy* (1) the other Judge Banerji J. expressing no opinion on the point.

As stated above however, in the case of *Raj Narain Mitter v. Panna Chand Singh* (4), the tenancy was a durputni i. e. a *permanent tenure* and not a raiyati holding and it was upon that ground

(1) (1899) I. L. R. 26 Calc. 315 (318).

(2) (1863) 1 Marsh 252.

(3) (1895) I. L. R. 24 Calc. 37.

(4) (1902) I. L. R. 30 Calc. 213.

that Banerji J. distinguished the cases of *Alim v. Satis Chandra Chaturdharin* (1) and *Kali Nath Sen v. Trailokhya Nath Roy* (2).

It is unnecessary to refer to cases relating to permanent tenures ; because the holder of a permanent lease may not be entitled to the indulgent consideration which might be extended to a raiyat so far as cases governed by the Bengal Tenancy Act are concerned. Section 179 expressly provides that nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently-settled area from granting a permanent mukarrari lease on any terms agreed on between him and his tenant.

The learned pleader for the appellant also relied upon the cases of *Tiluk Chandra Roy v. Jasada Kumar Roy* (3), and *Madhu Mala v. Alfazaddi Kazi* (4).

These cases no doubt related to raiyati holdings but the defendants in both the cases were *private* purchasers from the original tenant ; and apart from the provisions of the Bengal Tenancy Act, they would be bound by the contract in the same way as the original tenant was.

We were also referred to the case of *Abdul Hamid v. Abdul Miji* (5) where the original kabuliat which was executed prior to the passing of the Bengal Tenancy Act provided for interest at the rate of 75 per cent on overdue instalments and there was subsequently a solenama between the landlord and the tenants by which there was some variation of the rent. The question was whether the solenama created any new contract of tenancy. It was held that the solenama did not create any new contract of tenancy and the plaintiff was entitled to get interest at the rate stipulated. But there the defendant was the original tenant and there was no question of a purchase at a sale for arrears of rent at the instance of the landlord.

It is contended by the learned pleader for the appellant that no distinction should be drawn between the case of a private purchaser and a purchaser at a rent sale.

But there is a distinction between these two cases. In the case of a private transfer, the transferee can and should call for the title-deed of the vendor ; and if there is a lease providing for interest at a high rate, the purchaser becomes aware of such a contract before his purchase. He therefore purchases with full knowledge of the terms of the lease and he cannot in these circumstances complain that the rate of interest is an exorbitant one.

(1) (1896) I. L. R. 24 Calc. 37.

(3) (1906) 11 C. W. N. 215.

(5) (1916) 32 I. C. 710.

(2) (1899) I. L. R. 26 Calc. 313.

(4) (1909) 13 C. W. N. 962.

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Annadamoyi

v.

Saudamini.

In the case of a rent sale on the other hand, the purchaser ordinarily cannot have any knowledge of the terms of the contract between the landlord and the tenant unless the landlord chooses to specify in the sale proclamation any incident of the tenancy or refer to the contract under which the tenancy is held.

In these cases, we may observe that there was no such notification by the landlord.

Many agricultural tenancies in this country are held without any written contract at all, and if the landlord does not in the sale proclamation refer to any written contract under which, interest at a very high rate is payable, the purchaser has no means of knowing the terms of contract : and when a holding is put up to sale at the instance of the landlord himself without any such notification, the purchaser may be justified in purchasing the holding on the assumption that the ordinary rate of interest is payable ; interest under the Bengal Tenancy Act being payable at $12\frac{1}{2}$ per cent. and before the passing of the Bengal Tenancy Act at 12 per cent. under Act VIII of 1869.

For reasons stated above, we think that the decision of the lower appellate Court is correct and that the appeal must be dismissed with costs.

A. T. M.

Appeal dismissed.

PRIVY COUNCIL.

PRESENT : *Viscount Haldane, Viscount Cave and Lord Parmoor.*

E. D. SASSOON AND COMPANY,

v.

RAMDUTT RAMKISSEN DAS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL].

Award—Arbitrator acting without Jurisdiction—Indian Arbitration Act (IX of 1899), Secs. 9 (b), 14, 15—Award enforced by execution—Suit to declare award void—Agreement inconsistent with provisions of section 9 (b) of the Indian Arbitration Act.

Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought to be taken by motion under section 14 of the Indian

P. C.

1922.

June, 20, 22.
July, 20.

Arbitration Act, to set aside the award, but where it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose. Nor is the fact that the award has been enforced by execution under section 15 a bar to a suit to have it declared void and for consequential relief. Section 15 does not enact that the award, when filed, is to be deemed to be a decree of the Court, but only that it is to be enforceable as if it were a decree.

The effect of provisions in the contract is that on a failure by either party to appoint an arbitrator which includes a failure to appoint a substituted arbitrator on the death or retirement of an arbitrator originally appointed—the appointment is to be made by the Chairman of the Association on behalf of the defaulting party, so that in every such case there are to be two arbitrators, one appointed by one of the parties, and the other by the Chairman on behalf of the other party. Both are to be men engaged in the trade, and the decision of these skilled men or their umpire is subject to an appeal to the Committee of the Association.

Held, that this agreement being inconsistent with section 9 (b) of the Indian Arbitration Act, has the effect of excluding the operation of that section.

Appeal against the decision of the High Court of Judicature in Bengal, in its Civil Appellate Jurisdiction (Sanderson C. J. and Richardson J.), reversing that of the same Court (C. C. Ghose J.) in its ordinary Original Civil Jurisdiction.

The respondents brought this suit to have it declared that the award was void and inoperative, praying for an injunction restraining the appellants from withdrawing the sum in the Sheriff's hands and to have it declared that the respondents were entitled to a refund of that sum.

The material facts appear from the judgment of their Lordships.

Sir John Simon K. C. and *Hyam* for the Appellants.

Dunne K. C. and *Roy* for the Respondents.

The judgment of their Lordships was delivered by

Viscount Cave:—This is an appeal from a decree of the High Court of Judicature at Fort William in Bengal, in its Civil Appellate Jurisdiction, reversing a decree of the same Court in its ordinary original civil jurisdiction.

The appellants and respondents are merchants in Calcutta. By eleven contracts in writing, bearing various dates between September, 1913, and December, 1914, the appellants agreed to buy from the respondents a number of bales of jute of certain specified standards of quality. The contracts were all in a form approved by the Calcutta Baled Jute Trade Association, most of them containing what is called a "home guarantee" (that is to say, a guarantee

P. C.

1922.

E. D. Sass on
v.
Ramdutt.

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as to quality, condition and weight on terms contained in the London Jute Association contract), and all of them containing an arbitration clause in the following terms :—

"15. In the event of any dispute whatever arising out of, or in any way relating to, this contract or to its construction or fulfilment between the parties hereto, and whether arising before or after the date of expiration of this contract, the dispute shall be referred to arbitration in accordance with the Rules and By-Laws endorsed on this contract. Each party to the dispute shall appoint one arbitrator, and such arbitrators shall have the power to appoint an umpire. Both arbitrators and umpire must be persons engaged in the baled jute trade, and their award shall be final, subject only to right of appeal to the committee. The Association's Rules and By-Laws as printed on the reverse, form part of this contract."

The Rules and By-Laws referred to in the above clause include the following :—

Rule 27. "The Committee may, at their discretion, and upon payment of the prescribed fees, hear appeals against arbitration awards, provided they proceed in conformity with the By-Laws of the Association."

By-Law 15. "Where one of the parties to a dispute shall fail to appoint an arbitrator within 48 hours after having been called upon to do so, the Chairman of the Association shall appoint an arbitrator whose appointment shall be as lawful and binding upon the defaulting party as though he himself had appointed such arbitrator."

The Association referred to in the contract, Rules and By-Laws is the Calcutta Baled Jute Trade Association, and the Committee referred to is the Committee of that Association.

The jute, when delivered under the contracts, proved not to be of the specified quality, and a considerable part of it was "invoiced back" to the appellants and resold by them at lower prices, with the result that the appellants claimed to have suffered damages to the amount of Rs. 83,623, and demanded payment of this amount from the respondents. The demand having been refused, the appellants in July, 1915, appointed Mr. G. C. Allan to act as their arbitrator in the matter in accordance with the contracts, and the respondents after some delay, viz., in September, 1915, appointed Babu Sarat Chander Gossain to Act as arbitrator on their behalf. Mr. Allan endeavoured to arrange a meeting with Babu Gossain with a view to entering on the reference, but without success; and ultimately, on the 7th March, 1916 Mr. Allan retired from the refer-

ence. Thereupon, the appellants appointed Mr. S. H. Singleton to be an arbitrator in his place but Mr. Singleton was equally unsuccessful, in his efforts to get Babu Gossain to meet him; and after many excuses, the latter, on the 30th June, 1916, withdrew from the matter. On the 27th July, 1916, the appellants wrote to the respondents a letter referring to the retirement of Babu Sarat Chander Gossain and adding :—

“We, therefore, call upon you to appoint an arbitrator to act on your behalf, in the place of Babu Gossain, within 48 hours, failing which we shall apply to the Baled Jute Association to make an appointment in your behalf in accordance with By-Law 15 of the Association.”

To this letter, the respondents replied on the 31st July, as follows :—

“Yours of the 27th July, 1916.

“The time limit under the Indian Arbitration Act is over, and we regret that we cannot agree to further extension of time. Regarding your suggestion that you will ask the Chairman of the Association to appoint an arbitrator, we beg to point out that the Chairman has no authority to override the provision of the Indian Arbitration Act. Further, we hold that the dispute to settle which this arbitration was agreed upon, does not come under the terms of the Calcutta Baled Jute Association Contract, so the Chairman cannot exercise his rights under the contract.”

In answer to his letter, the appellants wrote to the respondents as follows :—

With reference to your letter of the 31st ultimo, we are advised that, neither of our arbitrators, Mr. Allan or Mr. Singleton, nor your arbitrator, Babu S. C. Gossain, having entered upon the reference, the question of the period of making their awards having expired does not arise. We, therefore, call upon you to appoint an arbitrator to act on your behalf in the disputes arising out of our claims under each of the above contracts as set out above, within seven clear days from this date, in default of which we shall appoint our arbitrator, Mr. S. H. Singleton, to act as sole arbitrator in the reference, in accordance with the provisions of the Indian Arbitration Act, section 9 (b) ”

The respondents having made no further appointment, the appellants, on the 4th September purported to appoint Mr. Singleton to act as sole arbitrator in the reference in pursuance of the Indian Arbitration Act, section 9 (b), and so informed the respondents. The respondents declined to recognise this appointment, but Mr.

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Singleton, after giving due notice to the respondents, proceeded with the reference *ex parte* and ultimately made eleven awards (one under each contract), by which he awarded to the appellants sums to be paid by the respondents amounting in all to Rs. 63,574. The awards were filed under section 11 of the Act and in pursuance of section 15 a warrant was issued directing the sheriff to levy the amounts awarded by seizure of the respondents' goods; and this was done.

On the 8th January, 1917, the respondents commenced against the appellants the present suit, in which they alleged (among other things) that the appointment of Mr. Singleton to act as sole arbitrator was illegal, and that the awards were void and inoperative, and claimed a declaration to that effect, an injunction restraining the appellants from withdrawing the sum in the Sheriff's hands and a declaration that the respondents were entitled to a refund of that sum. There was also a claim for damages which has not been proceeded with. Under a consent order made in the suit on the 12th January, 1917, the amount in the sheriff's hands (Rs. 66,477) was paid to the defendants, but it was agreed that for the purpose of the suit, the money should be deemed to be still in the sheriff's hands.

On the hearing of the suit before Mr. Justice Ghose on the 7th April, 1920, the defendants contended, first, that having regard to the provisions of sections 42 and 56 of the Specific Relief Act, and to the fact that the plaintiffs did not claim to set aside the awards, and the execution proceedings, the suit was not maintainable, and, secondly, that the awards were not made out of time. The learned Judge overruled the first but he upheld the second contention, and held the awards to be valid, and accordingly dismissed the suit with costs.

On appeal to the High Court at Fort William, the plaintiffs, while still maintaining that the time for making the awards had expired, relied mainly upon a point which, although open to them upon their pleadings, had not been argued in the Court of first instance. They now contended that the appointment of Mr. Singleton as sole arbitrator was illegal on the ground that the scheme of arbitration contained in clause 15 of the contract, and in the Rules and By-Laws annexed, was inconsistent with section 9 (b) of the Arbitration Act under which that appointment was made, and accordingly that, a "different intention" having been expressed in the contract, section 9 (b) did not apply. The learned Judges who heard the appeal (Sir L. Sanderson, C. J., and Richardson, J.) acceded to this contention and held that the appointment of Mr.

Singleton as sole arbitrator was ineffective, and that the awards were void on that ground. Upon the question whether the awards were out of time, the learned Judges were disposed to take different views; but upon this point they gave no definite decision, as their conclusion upon the other point was sufficient to dispose of the suit. The Court accordingly allowed the appeal and declared the awards void, and with the consent of the parties, ordered the defendants to repay the above sum of Rs. 68,574 to the plaintiffs upon an undertaking by the latter to return the amount if the awards should be found valid by this Board. In view of the fact that the point on which the plaintiffs had succeeded had not been taken in the Court below, the parties were ordered to bear their own costs of the original trial. Against this decision the defendants now appeal to the Board.

On the argument before their Lordships, it was argued, as a preliminary point, that the suit would not lie, as the only remedy open to the plaintiffs was to move to set aside the awards under section 14 of the Arbitration Act, and this could not be done after the awards had been enforced by execution. In their Lordships' opinion, there is no substance in this point. Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought, no doubt, to be taken by motion to set aside the award; but where (as here) it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose. Nor is the fact that the award has been enforced by execution under section 15 a bar to a suit to have it declared void and for consequential relief. Section 15 does not enact that the award, when filed, is to be deemed to be a decree of the Court, but only that it is to be enforceable as if it were a decree.

A suggestion was also made that the suit was open to objection under sections 42 and 56 of the Specific Relief Act, on the ground that no relief was asked other than a declaration; but in their Lordships' opinion this is not the case. The plaint asked not only for a declaration but also for an injunction, repayment of the amount levied, and other relief. Further, it is difficult to see how any technical objection to the jurisdiction can now be maintained, having regard to the fact that the order appealed from was to some extent a consent order, and contemplated that the question of the validity of the awards should be finally determined by this Board.

Turning now to the substance of the case, the main question is whether the submission to arbitration contained an expression of a

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"different intention" which had the effect of excluding the operation of section 9 (b) of the Arbitration Act. In their Lordships' opinion, this question must be answered in the affirmative. Each of the contracts provides that any dispute shall be referred to arbitration "in accordance with the Rules and By-Laws endorsed on this contract, and that such Rules and By-Laws shall form part of the contract ; and By-Law 15 is to the effect that, where one of the parties to a dispute fails to appoint an arbitrator within the time limited, "the Chairman of the Association shall appoint an arbitrator whose appointment shall be as lawful and binding upon the defaulting party as though he himself had appointed such arbitrator." The contract further provides that both arbitrators and umpire must be persons engaged in the Baled Jute Trade, and that their award shall be final, subject only to a right of appeal to the Committee of the Association. The effect of these provisions is that on a failure by either party to appoint an arbitrator—which includes (in their Lordship's opinion) a failure to appoint a substituted arbitrator on the death or retirement of an arbitrator originally appointed—the appointment is to be made by the Chairman on behalf of the defaulting party, so that in every such case there are to be two arbitrators, one appointed by one of the parties, and the other by the Chairman on behalf of the other party. Both are to be men engaged in the trade, and the decision of these skilled men or their umpire is subject to an appeal to the Committee of the Association. It is to such a domestic tribunal, so constituted, that the parties have agreed to submit their differences ; and, this agreement appears to their Lordships to be quite inconsistent with section 9 (b) of the Act, under which, if it comes into operation, the decision will be made by a single arbitrator chosen by one party only. Further it appears to be at least doubtful whether, if the scheme of the By-Laws were departed from by the application of section 9 (b), the right of appeal to the Committee would continue to be effective. Upon the whole, therefore, their Lordships agree on this point with the judgment of the appellate Court.

It was contended on behalf of the appellants that the respondents' letter of the 31st July, 1916, above quoted, had the effect of excluding an appointment by the Chairman and evidencing a new agreement to which the Arbitration Act, including section 9 (b), would apply : but in their Lordships' opinion, that letter cannot have this effect. By the letter, the respondents contended that the time for making the award had expired, and that the Chairman had no authority to override the provisions of the Arbitration Act in

that respect ; and also that the dispute did not come under the terms of the contract at all. They may have been mistaken in both these contentions ; but there was clearly no intention on their part to set up any new form of arbitration different from that to which they had agreed. The appellants, erroneously as it now appears, accepted the respondents' view that the Chairman had no authority to appoint, and had resort to section 9 (b) of the Act. In this, unfortunately, they were wrong ; and they must now accept the consequences of their action.

As the above considerations dispose of the appeal, it is unnecessary to consider the question raised as to the awards being out of time. Their Lordships will accordingly humbly advise His Majesty that the appeal fails and should be dismissed with costs.

Sandersons and Orr Dignams : Solicitors for the Appellants.

W. W. Box & Co. : Solicitors for the Respondents.

A. T. M.

Appeal dismissed.

PRESENT : *Viscount Haldane, Viscount Cave, Lord Parmoor,*
and Mr. Justice Duff.

MA SHWE MYA

v.

MAUNG HO HNAUNG.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA.]

Registration—Registration Act (XVI of 1908), Secs. 2, 32—‘Representative’—Clerk of District Court, if representative—Security bond given to District Judge—Bond presented by Clerk of District Court.

The provisions of section 32 of the Registration Act are imperative, and, unless a document presented for registration is so presented by one of the persons described in the section the presentation does not give to the Registrar the indispensable foundation of his authority to register it, and the registration, if made, is invalid; *Jambu Parshad v. Muhammad Aftab A'i Khan* (1) followed.

The word 'representative' is a term of ambiguous meaning, and must be construed according to its context. That word in section 32 of the Registration Act, refers to legal personal representative, or (by virtue of section 2) the guardian or committee of the person described and does not include a clerk or agent.

(1) (1914) L. R. 42 I. A. 22 ; I. L. R. 37 All. 49 ; 21 C. L. J. 218.

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A mortgage bond given by certain persons to the District Judge to secure the performance of any order which His Majesty in Council might make on an appeal then pending, was presented for registration by a clerk of the District Court. The obligors attended for the purpose of admitting execution, but did not join in the presentation. The document was not presented by any agent holding a power of attorney:

Held, that the registration of the security bond was invalid and that the security was insufficient.

That the clerk was not a representative of the District Judge within the meaning of paragraph (b) of section 32 of the Registration Act.

Appeal from the decision of the Judicial Commissioner Upper Burma, affirming that of the District Judge of Yenangyaung.

The material facts appear from their Lordships' judgment.

Parikh for the Appellant.

No one for the Respondent.

The judgment of their Lordships was delivered by

July, 31.

Viscount Cave:—The question arising for determination upon this appeal is whether a certain security bond dated the 8th January, 1920 was validly registered under the Indian Registration Act No. XVI of 1908. Section 32 of that act, so far as it is now material, requires that every document to be registered under the Act "shall be presented at the proper registration office (a) by some person executing or claiming under the same . . . ; or (b) by the representative or assign of such person ; or (c) by the agent of such person, representative or assign, duly authorised by power of attorney executed and authenticated in manner hereinafter mentioned." It is established by a series of decisions, of which one of the most recent is *Jambu Parshad v. Muhammad Aftab Ali Khan* (1), that the provisions of the section are imperative, and that unless a document presented for registration is so presented by one of the persons described in the section, the presentation does not give to the registrar the indispensable foundation of his authority to register it, and the registration, if made, is invalid.

In the present case the document in question—a mortgage bond given by certain persons to the District Judge of Yenangyaung, to secure the performance of any Order which His Majesty in Council might make on an appeal then pending in this suit—was presented for registration (as the endorsement shows) to the Sub-Registrar at Yenangyaung "by Maung U on behalf of the Additional District

(1) (1914) L. R. 42, I. A. 22.

Judge, Yenangyaung" and was registered by the Sub-Registrar who gave the usual certificate of registration. Maung U appears to have been a clerk of the District Court. On application being made to the District Judge for the approval of this security as sufficient, the appellant objected that it had not been duly presented for registration under the Act ; but the District Judge overruled the objection and approved the security, and his decision was affirmed by the Judicial Commissioner. Hence the present appeal. It should be added that the principal appeal in the suit has since been allowed by His Majesty in Council so that the bond, if valid, has become operative ; and that the appellant is desirous, before seeking to enforce the bond against the obligors and the mortgaged property to have it determined whether the bond is effective or requires re-registration under Act XV of 1917.

The respondent was not represented on the appeal, and their Lordship has accordingly not heard an argument in support of the validity of the bond ; but on the facts brought to their notice they are of opinion that there was no proper presentation under the section, and accordingly that the registration was invalid. The bond was not presented by any person executing or claiming under it. For the District Judge was not present ; and, although the obligors appear to have attended for the purpose of admitting execution, they did not join in the presentation. Nor was the document presented by any agent holding a power of attorney. The only question therefore, is whether Maung U, who appears to have attended and presented the deed on behalf of the District Judge can be said to have been a "representative" of the District Judge within the meaning of paragraph (b) of section 32. In their Lordships' opinion, he cannot. The word "representative" is a term of ambiguous meaning, and must be construed according to its context. In ordinary legal use, it denotes the executor or administrator, or sometimes the heir or next of kin. In a certain context it may mean an agent ; but in the present case, that meaning is excluded by the circumstance that under paragraph (c) of the section, the agent is separately referred to and is required to hold a duly authenticated power of attorney. By section 88 of the Act, it is provided that Government officers and certain public functionaries need not appear in person or by agent at a registration office in any proceeding connected with the registration of instruments executed by them in their official capacity, and that, in such cases, reference may be made to the office for information ; but no similar provision is made for the case of instruments under which any such officer or func-

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tionary may claim. Probably the omission is inadvertent; but if so, this must be remedied (if at all) by legislation. Their Lordships' attention has not been called to any enactment which makes a clerk of a Court the representative, in any legal sense, of the Judge.

Upon the whole their Lordships are satisfied that the term "representative" in section 32 refers to the legal personal representative or (by virtue of section 2) the guardian or committee of the person described and does not include a clerk or agent. The result is that, in their Lordships' opinion, this appeal should be allowed and it should be declared that the registration of the security bond was invalid, and that the security was insufficient. Upon this declaration being made, the District Judge will, no doubt give facilities for the re-registration of the bond under Act XV of 1917. The appellant should be at liberty to add her costs of the appeal to the Judicial Commissioner on the question of the security, and her costs of this appeal, to her security.

Their Lordships will humbly advise His Majesty accordingly.

E. Dalgado : Solicitor for the Appellant.

A. T. M.,

Appeal allowed.

PRESENT : *Lord Buckmaster, Sir John Edge, Sir Lawrence Jenkins and Lord Salvesen.*

THAKURAIN HARNATH KUAR

v.

THAKUR INDAR BAHADUR SINGH.

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October, 26, 27.
November, 28.

[ON APPEAL FROM THE SUPREME COURT OF THE JUDICIAL
COMMISSIONER OF OUDH]

Oudh Estates Act (I of 1869)—Succession—Widows and reversioner's rights—Expectancy—Transfer—Claim for money advanced on transfer—Agreements and contracts—Distinction—Contract Act, (IX of 1872), Ss. 2, 65—Limitation.

The last male holder of the estates of Paska and Lilar in Oudh died childless in 1873. His widows set up a will of their husband empowering them to adopt. The respondent Indar Bahadur Singh as the nearest reversioner instituted a suit against them and the Court of Wards, who had taken over the estates, and

obtained a decree declaring the alleged will to be invalid and that he was entitled to succeed to Paska and Lilar on the death of the last surviving widow of the last male holder.

The husband of the plaintiff appellant advanced Rs. 20,000 to Indar Bahadur for this litigation and a further sum of Rs. 5,000 for other expenses and obtained an instrument of transfer on which the present suit is brought :

Held, that whatever the view that may once have prevailed, it is now established that under the Oudh Estates Act the succession to collaterals opens on the death of the widow just as under the ordinary Hindu Law and that the transfer in question was void as being the transfer of an expectancy merely.

Held also, that under section 65 of the Contract Act, the transferee was entitled to recover the sum advanced by him and that the claim was not barred by limitation as the agreement was not discovered by the appellant to be void till his demand for possession of the transferred property was resisted by the respondent, which was within three years of the present suit.

Appeal from a decree of the Court of the Judicial Commissioner of Oudh, which affirmed a decree of the Subordinate Judge of Bara Banki.

The suit was for possession of the villages specified in the plaint with an alternative prayer for payment of money. Both the Indian Courts decided adversely to the appellant with regard to both his claims. Hence this appeal.

The facts and the circumstances of the case are fully set out in their Lordships' judgment.

Lowndes K. C. and *Dube* for the Appellant : The transfer of the villages was before the Transfer of Property Act of 1882. It is thus governed by the ordinary Hindu law and not by the provisions of the latter Act. The respondent got into possession in 1911. Under the Oudh Estates Act, the widow has only a life estate and the reversioner has a vested interest. Under the Hindu law, the sale of a vested estate is not void. Further the instrument is only an agreement to sell. The claim of the appellant is maintainable on the doctrine of estoppel feeding the grant. The Indian Courts held that it was a transfer of *spes successionis* and void under section 6 of the Transfer of Property Act. On the alternative claim, they held that it was barred by limitation. The starting point for limitation is when it was pleaded that the transfer was of *spes successionis*. The alternative claim is based upon section 65 of the Contract Act. The agreement was not discovered to be void in this case till possession of the villages was resisted by the respondent.

De Gruyther K. C. and *Parikh* for the Respondent argued that the Deputy Commissioner's decree was not made on a consideration

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of the respondent's position under the Oudh Estates Act. A Hindu reversioner cannot bind the property to which he may succeed. Section 23 of the contract Act makes the present transfer void, because the consideration was not legal. This is not an agreement discovered to be void under section 65 of the Contract Act. Limitation begins to run from the date on which the money was recoverable and that was the date when the illegal transfer was effected. Therefore the claim for payment of money is long barred.

Parikh followed.

Lowndes K. C. replied at length on the question of the alternative claim and referred to section 65 of the Contract Act and section 84 of the Indian Trusts Act as to the policy of the law. The contention that the discovery should be one of fact and not of law cannot be sustained as the words of the section are wide enough to exclude this contention.

The judgment of their Lordships was delivered by

November, 28.

Sir Lawrence Jenkins : This is an appeal from a decree dated the 20th March, 1918, of the Court of the Judicial Commissioner of Oudh, which affirmed a decree dated the 3rd August, 1915, of the Subordinate Judge of Bara Banki.

The suit is for the possession of the villages specified in the plaint with an alternative prayer for the payment of money. Both the lower Courts have decided adversely to the plaintiff on each of these claims, and the suit has been dismissed with costs. From this decision the present appeal has been preferred.

The plaintiff's claim to the villages rests on an instrument which purports to have been a transfer on sale executed on the 2nd January, 1880, by the defendant, Indar Bahadur Singh in favour of Rachpal Singh, the plaintiff's deceased husband.

The villages were part of two taluquas in Oudh, known as Paska and Lilar, and owned by Thakur Naipal Singh, whose name was entered in List II attached to the Oudh Estates, Act I, of 1869, as estates which, according to the custom of the family, ordinarily devolved upon a single heir.

Thakur Naipal Singh died childless on the 28th October, 1873, leaving him surviving his two widows, Thakurain Iklas Kuar and Thakurain Choti. According to Hindu law, the defendant Indar Singh was the next reversioner. The widows set up a will as that of their deceased husband, and claimed that it empowered them to adopt. Indar Singh thereupon instituted a suit against them and the Court of Wards, who had taken over the estates, and, by the

decree of the Deputy Commissioner of Bara Banki dated the 22nd October, 1878, the alleged will was declared void and invalid, and Indar Singh was declared "entitled to succeed to Paska and Lilar estates on the death of the last surviving widow of the late Naipal Singh."

It is the plaintiff's case that in 1878 her husband, Rachpal Singh advanced Rs. 20,000 for this litigation and other expenses to Indar Singh, who was a poor man, and that in 1880, on a further advance of Rs. 5,000, Indar Singh executed the instrument of transfer on which this suit is brought.

Both Courts have held that the transfer was inoperative, as Indar Singh at its date had no interest capable of transfer but merely an expectancy.

It cannot be disputed that, according to the ordinary Hindu law, this is the true view, but the plaintiff, to escape from this predicament, contends that the rights of Indar Singh must be determined by reference to the provisions of the Oudh Estates Act and the declaration contained in the Deputy Commissioner's decree.

Whatever the view that may once have prevailed, it is now established that under the Oudh Estates Act the succession to collaterals opens on the death of the widow just as under the ordinary Hindu law, and it necessarily follows that in January, 1880, Indar Singh had no more than an expectancy, and so had no interest in the villages which he was competent to transfer or bind.

Nor, in their Lordships' opinion, was this position modified by the Deputy Commissioner's decree. As the suit was constituted, the Deputy Commissioner could only have made a declaration binding on the widows and the Court of Wards, and it certainly was not within his competence to make a valid declaration that would create in Indar Singh's favour an interest in the villages that did not otherwise exist. The claim for possession was, therefore, rightly rejected.

And so it becomes necessary to consider the claim for payment of money. The amount demanded is Rs. 1,28,033-4-8, and this is made up of Rs. 25,000 principal and Rs. 1,03,033-4-8 interest at Re. 1 per cent per month from the 2nd January, 1880, to the 5th May, 1914.

The payment of the Rs. 25,000 is established, and the defendant's pleas that the instrument of the 2nd January, 1880, was executed under undue influence and was extortionate have failed, but the claim for recovery of the money has been held to be barred by limitation.

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Before this Board, the claim has been based on section 65 of the Contract Act. It is there provided that "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it."

So framed, the plaintiff's claim to compensation rests, not on any principle or formula of English Law, but on the words of this section, and it has to be seen whether the facts of this case come within its scope. The section deals with (a) agreements and (b) contracts. The distinction between them is apparent from section 2. By clause (c) every promise and every set of promises forming the consideration for each other is an agreement, and by clause (h) an agreement enforceable by law is a contract. Section 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) an agreement not enforceable by law is said to be void.

An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

The agreement here was manifestly void from its inception, and it was void because its subject matter was incapable of being bound in the manner stipulated.

Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the lower Courts, their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh in the villages which he purported to sell by the instrument of the 2nd January, 1880, and that the true nature of those rights was not discovered by the plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted, and that was well within the period of Limitation.

It was thus that the agreement was discovered to be void, and the discovery in their Lordships' view, was one within the words and the meaning of section 65 of the Contract Act.

The plaintiff, therefore, though not entitled to recover possession of the villages, is entitled to recover compensation, and in assessing that compensation their Lordships consider it should include the sum of Rs. 25,000 found by both Courts to have been paid to Indar Singh, and also in the circumstances of this case, interest,

not at the rate or for the period claimed by the plaintiff, but at 6 per cent. from the date of the institution of this suit. Their Lordships will, therefore, humbly advise His Majesty that the decree under appeal should be varied in accordance with this opinion, and that the respondent should pay the costs of the plaintiff in both the lower Courts. The costs of this appeal must be paid by the respondent.

Barrow, Rogers & Nevill : Solicitors for Appellant.

T. L. Wilson & Co : Solicitors for Respondent.

K. V. L. N.

Appeal allowed.

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PRESENT : *Lord Phillimore, Lord Carson and Sir John Edge.*

JAI BERHAM AND OTHERS

v.

KEDAR NATH MARWARI AND OTHERS.

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May, 9, 11.
June, 19.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA].

Restitution—Civil Procedure Code (Act V of 1908), Sec. 144—Inherent jurisdiction—Setting aside of auction sale—Deposit of purchase money—Money distributed amongst creditors of judgment-debtor—Judgment-debtor, if to pay—Auction-purchaser clearing off charges on property—Interest.

It is the duty of the Court under section 144 of the Code of Civil Procedure to "place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed." This duty or jurisdiction does not arise merely under the section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved.

A certain property was sold in execution of a decree. The purchase money was duly paid; the sale was confirmed and a sale certificate was given to the purchaser. The purchase money was distributed amongst creditors of the judgment-debtor who had attached the property. The auction purchaser paid off dues on certain bonds. This auction sale was afterwards set aside on appeal:

Held, that the judgment-debtor should be restored to the property after making good to the auction purchaser the moneys which had been applied for his benefit, viz., the moneys distributed amongst creditors of the judgment-debtor.

That the moneys paid for clearing off dues on bonds, were optional payments,

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made without any order of the Court; that these payments could not be made a condition of restoration to the judgment-debtor.

The order of the Court was silent as regards interests on 'mesne profits' and 'deposit'.

Held, that the equities of the case would be met by disallowing interest in either case.

Appeal by the judgment-debtors, and cross-appeal by the Auction-purchaser against the decree of the High Court of Patna, reversing that of the Subordinate Judge of Godda.

The material facts appear from the judgment of their Lordships.

Dunne K. C. and *Brown* for the Appellants.

De Gruyter K. C. and *Hyam* for the Respondents.

The judgment of their Lordships was delivered by

Lord Carson :—The question to be decided in this appeal arises out of an order on appeal made by His Majesty in Council dated the 19th December, 1913, which set aside an auction sale of certain landed property held on the 27th July, 1904, in execution proceedings in the Court of the Subordinate Judge of Godda.

The case before this Board is reported in L. R. 41, I. A. 38.

Rajah Thakoor Barma, since deceased, the predecessor-in-title of the appellants 1-5 (hereinafter referred to as the judgment debtors) was the owner of a full 16 annas share of a village called Patsanda. Ten of the said shares were encumbered and six were unencumbered, save that two bonds had been executed by the Rajah in favour of one Gobardhan Das and others, which purported to create a charge on a 3 annas share in the said mahal as security for the said Gobardhan Das for Rs. 23,965 and Rs. 532.

Six annas share of the encumbered property was attached for a judgment debt in execution of a decree obtained by the respondents third party, and sold on the 27th July, 1904. The respondents first and second parties are the representatives of the original auction purchasers and are hereinafter referred to as the auction purchasers.

The purchase money was a sum of Rs. 1,12,000, and this sum was paid into Court and eventually distributed to various mortgagee decree-holders and others holding money decrees against the judgment-debtor whose debts were thereby discharged to the extent of such payments.

The auction purchasers claimed to have purchased for the sum

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aforesaid the six unencumbered annas share, and on the 21st December, 1904, a sale certificate was granted to the auction purchasers, which declared the respective interest of the auction-purchasers, in the six annas share, and also declared that such share was subject to the charge created by the aforementioned bonds, but was outside the 10 annas share hereinbefore described as the encumbered property.

On the 26th December, 1904, the auction purchasers were duly put into possession of the said six annas share and paid off on the 7th February, 1905, the amounts covered by the two bonds. An appeal was subsequently made by the Rajah to the High Court of Calcutta against the order of the Subordinate Judge of the 21st December, 1904, granting the said sale certificate, and when this appeal was dismissed he appealed further to His Majesty in Council, and this Board on the 25th November, 1913, advised that the appeal should be allowed and that the order of the Subordinate Judge confirming the sale, together with the said certificate of sale of the 21st December, 1904, should be set aside, and added "this will, of course, have the effect of setting aside all subsequent proceedings on the part of the auction purchasers based thereon." In consequence of this order setting aside the sale the judgment debtors applied to the Subordinate Judge claiming restoration to them of the said 6 annas share of the property, together with mesne profits.

The auction purchasers resisted the said claim, and contended (1) that the auction purchasers could not be asked to restore the property until (a) the amount which they had deposited in Court to complete the sale; and (b) the sum paid by them to satisfy the bonds given by the Rajah to Gobardhan Das had been refunded and they also claimed that Chaturi Ram Marwari, one of the auction purchasers, who was a respondent in the appeal before the Privy Council, had died before the hearing, and that therefore the order of His Majesty in Council could not affect his share, *viz.*, $\frac{1}{4}$ an anna of the 16 annas.

The Subordinate Judge overruled all the contentions of the auction purchasers, and by an order dated the 20th August, 1916, ordered restitution to the judgment debtors of the said 6 annas share, together with the mesne profits from the date of delivery of possession of the said property, after the auction sale on the 27th July, 1904.

From that order the auction-purchasers appealed to the High Court of Judicature at Patna, who, by order dated the 14th Decem-

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ber, 1916, set aside the order of the Subordinate Judge, and in lieu thereof, ordered that the Subordinate Judge should ascertain :

(1) "Whether Chaturi Ram died before the hearing of appeal by the Judicial Committee ; (2) that he do ascertain the amount of mesne profits due on the share in respect of which restoration is to be made ; and (3) that he set off the sum due to the judgment-debtors as mesne profits against the sum due to the auction-purchasers in recovery of their deposit and in the event of the sum due to the judgment-debtors being in excess of the sum due to the auction-purchasers he do restore possession of the property forthwith to the judgment-debtors and in the event of the sum due to the auction-purchasers being in excess of the sum due to the judgment-debtor he do refuse to restore possession of the property until the deficit due to the auction-purchasers has been made up either of the decree-holders or by the judgment debtors themselves."

It is to be observed that the Court made no order as to the claim of the auction purchasers to be paid as a preliminary to restoring possession the sum paid to Gobardhan Das in respect of the two bonds, creating a charge on 3 annas share of the unencumbered property sold to the auction purchasers.

The appellants (the judgment-debtors) have appealed to His Majesty in Council against the said judgment and decree of the High Court, dated the 14th December, 1916, and the auction purchasers (respondents first and second parties) have entered a cross appeal relating to the payments to Gobardhan Das as aforesaid. On the main question, *viz.*, whether the auction-purchasers are entitled to repayment of the deposit paid into Court as a condition precedent to their handing over possession to the judgment-debtors, their Lordships are in agreement with the judgment of the High Court, and think the order already referred to should on this point be affirmed. It is the duty of the Court under section 144 of the Civil Procedure Code to "place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed." Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Cairns L. C. in *Rodger v. the Comptoir d'Escompte de Paris* (1). "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression 'the act of the Court,' is used, it does not mean

(1) (1871) L. R. 3 P. C. 465 (475).

merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case." The auction-purchasers have parted with their purchase money which they paid into Court on the faith of the order of confirmation and certificate of sale already referred to. This money has been distributed amongst creditors of the judgment-debtor who had attached the unencumbered property in question and could have realised their judgment-debts by a sale of this property in execution and it would be inequitable and contrary to justice that the judgment-debtor should be restored to this property without making good to the auction-purchaser the moneys which have been applied for his benefit.

It was argued that the remedy of the auction-purchasers was either to apply for a certificate of sale of the unencumbered property or to obtain from the judgment creditors repayment of the sums paid out to them under the orders of the Court. Their Lordships cannot agree with either of these suggestions, and for the reasons stated by the Judges of the High Court.

As regards the sums paid by the auction purchasers to Gobardhan Das to clear off the bonds charged on the property they had intended to purchase, their Lordships are in agreement with the decision of the High Court that this payment stands on a different footing from the deposit of the purchase money. It was an optional payment, made without any order of the Court, and as it entitled them to stand in the shoes of Gobardhan Das as holders of the bonds, it entails no hardship; but however that may be, these payments cannot be made a condition of restoration to the judgment-debtors.

A question was raised before this Board as to whether the "mesne profits" on the one hand, and "the deposit" on the other, should under the order of the High Court carry interest. The order is silent upon this point, but in their Lordships' opinion the equities of the case will be met by not allowing interest in either case.

There only remains the question as to the rights of Chaturi Ram who was one of the auction-purchasers at the said sale of the $\frac{1}{2}$ anna share of the mahal. It is alleged that he had died pending the hearing of the appeal before the Privy Council and that as his heir or personal representative was not brought upon the record, the order on the advice of their Lordships in the Privy Council cannot affect the $\frac{1}{2}$ anna share in his possession or that of his heir.

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Their Lordships have no evidence before them of the facts alleged and no claim was presented on behalf of the said Chaturi Ram or his representative and they are of opinion that under the circumstances, the order in this case should be made without prejudice to the rights, if any, of Chaturi Ram, or if he is deceased, of his heir or legal personal representative.

Their Lordships are of opinion that the order of the High Court, subject to the modification last hereinbefore mentioned, should be affirmed, and that the appeal and cross appeal should be dismissed with costs, including in the case of the appeal the costs of the petition to add certain documents to those set out in the record as originally printed, and they will humbly advise His Majesty accordingly.

Watkins and Hunter : Solicitors for the Appellants.

Barrow, Rogers and Nevill : Solicitors for the Respondents.

A. T. M.

Appeal and cross-appeal dismissed.

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PRESENT :—*Lord Phillimore, Lord Carson and Sir John Edge*

RAMSUMRAN PRASAD AND ANOTHER

v.

SHYAM KUMARI AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA]

Hindu widow—Alienation—Necessity—Compromise.

The word 'necessity,' when used in connection with alienation by a Hindu widow, has a somewhat special, almost technical, meaning. A widow can alienate if there are no other means available for the obligatory ceremonies to secure the repose of the soul of her husband. A holder of a Hindu woman's estate can in some circumstances alienate immovable property to pay the last owner's debts, or (if there is no other available source of supply), for her own or infant children's maintenance. Necessity does not mean actual compulsion, but the kind of pressure which the law recognises as serious and sufficient.

A compromise made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner, will bind the reversioner quite as much as a decree on contest : *Mohendra v. Shamsunnissa*. (1) approved.

Appeal from the decree of the High Court at Patna.

(1) (1914) 21 C. L. J. 157.

Suit for recovery of possession of certain property said to be alienated by widow as one of the terms of a compromise of litigation originally brought by her husband and continued by her after his death.

The material facts appear from their Lordships' judgment.

De Gruyther K. C. and *Brown* for the Appellants.

Majid for Respondent No. 1.

Dunne K. C. and *Sen* for Respondent No. 4.

The judgment of their Lordships was delivered by

Lord Phillimore.—The question raised on this appeal is whether the reversionary heirs of one Brij Mohan Lal can recover possession of certain property which is said to have been alienated by his widow as one of the terms of a compromise of litigation originally brought by Brij Mohan Lal and continued by his widow after his death. He had begun the suit on the 18th July, 1895, and died on the 22nd December. The suit was brought to enforce two mortgage bonds. There was a claim by a prior mortgagee which eventually came up before this Board, and resulted in a decree which was generally favourable to the widow, but required her to pay into Court a considerable sum to the credit of this first mortgagee. She paid this, and then proceeded to execute a decree for recovery of what was due to her on the mortgage bonds, which was ascertained by the decree to be the sum of Rs. 141,959. Six of the properties were then put up for auction on the 20th June, 1912, the widow having leave to bid, and she bought them for the sum of Rs. 65,075. Thereupon the judgment debtors filed a petition in objection to the sale, and the widow came to the compromise which is now impeached.

By this compromise she agreed that the sale of the six properties should be set aside, and that the judgment-debtors should be allowed to sell them again to certain proposed purchasers for a sum total of Rs. 66,000 to be paid over to her. It was further provided that the two other properties should be hers to sell and make what she could of them, it being estimated that she would probably obtain Rs. 5,000. The rest of the debt, Rs. 70,259, was remitted.

The reversioners, hearing of this transaction, applied for leave to intervene in the suit and oppose, but were refused, all their rights being reserved. Thereupon the present suit was instituted by them, praying that the order entering satisfaction of the

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judgment debts should be vacated, for a declaration of their rights and for an injunction and further or other relief. They said that the sale was fraudulent, collusive and illegal.

The widow, the judgment debtors and the purchasers from the judgment-debtors all appeared and defended. One of the points set up on behalf of the defendants was that the widow's husband's family was governed by the Mithila School of Hindu law, which gives larger powers to a Hindu woman when an estate is vested in her than she gets under the Mitakshara. This was negatived by both Courts—and need not now be considered.

On the other hand, both Courts have found that there was no fraud or collusion, and have taken the view that the compromise should stand, and have dismissed the suit. The principal ground on which the supposed fraud rested was that the properties released being worth considerably more than Rs. 66,000, the purchasers from the judgment-debtors had obtained very advantageous bargains, and that one of these purchasers was the widow's brother. Both Courts, however, having negatived fraud, it would require an exceptionally strong case to induce this Board to take a contrary view, and indeed the appellants have not ventured to question this part of the decision.

The points further to be decided are, first of all, whether the widow or anyone holding what is known as a Hindu woman's estate, especially perhaps if that estate consists of immovable property, can compromise in any circumstances, and secondly, whether this compromise is sufficiently reasonable for the Courts to allow it to stand.

Their Lordships have been invited in an elaborate argument which has reviewed all the authorities to hold either that there is no such power of compromise at all, or that a compromise which results in the surrender of land must be treated on the footing that such an alienation is on the same footing with other alienations of land which the holder of a Hindu woman's estate can make, namely, that they are justifiable by necessity and necessity only.

It should be observed *in limine* that the word necessity, when used in this connection, has a somewhat special, almost technical, meaning. A widow can alienate if there are no other means available for the obligatory ceremonies to secure the repose of the soul of her husband. A holder of a Hindu woman's estate can in some circumstances alienate immovable property to pay the last owner's debts, or (if there is no other available source of supply) for her own or infant children's maintenance. Necessity does

not mean actual compulsion, but the kind of pressure which the law recognises as serious and sufficient.

Bearing this in mind their Lordships will proceed to consider whether an alienation which is the result of a compromise or the mode by which a compromise is carried into effect, should, if the compromise be reasonable and prudent, and for the interest of the estate, fall within the power of the holder of a Hindu woman's estate, either as being an alienation which is to be deemed to be induced by necessity, or as being in a parallel position to an alienation induced by necessity. It may be observed at once that the argument which would refuse authority to compromise in any case could have very extreme consequences. A Hindu woman might be party to a litigation concerning considerable immovable property, might be successful in the first Court and be threatened with an appeal, and have then a suggestion from the adversary that if she would part with a single item of property or a few bighas he would let the judgment stand. She would have if the argument were sound to refuse the suggested compromise, and be prepared to fight the case up to the Privy Council. Or it might be put in another way. Her opponent could never suggest a compromise, because he would know that any compromise would be upset. It would be very undesirable in the interests of property owners that this extreme doctrine should be upheld, and their Lordships, after consideration of the authorities that have been cited to them, are glad to find that they are not driven to any such extreme position.

The case of *Katama Natchier v. The Rajah of Shivagunga* (1) decided in 1864, (1863 ?) which has been brought to their Lordships notice, has no direct bearing upon the point now to be discussed, but it is perhaps useful as an introductory statement. Their Lordships there held that a decree fairly and properly obtained against a widow binds the succeeding heirs because the whole estate is for the time vested in her, absolutely for some purposes, though in some respects for a qualified interest, and because until her death it could not be ascertained who would be entitled to succeed (p. 604).

In *Tarinee Churn Gangooly v. Watson & Co.* (2) decided in 1869, the High Court at Calcutta had to deal with the case of a widow who was under age and had a minor son, and the judges held that if she was properly represented in the suit they must treat the matter as standing precisely as if she had been of age, and had

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(1) (1863) 9 M. I. A. 539.

(2) (1869) 12 W. R. 413 ; 3 B. L. R. 437.

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acted on her own behalf, that it was erroneous to look upon the transaction simply as an alienation by her, and that she had full power to compromise a suit or even to have entered into a compromise before the suit was brought.

In *Khunni Lal v. Gobind Krishna Narain* (1), decided in 1911, an agreement of compromise was made between the daughters of the pre-deceased son of a convert from Hinduism to Mahommedanism, and his heir at law, by which the property was divided into certain shares between the daughters and the alleged heir-at-law. After the death of the daughters, the heirs in reversion claimed the estate against the derivative purchasers from the heir-at-law, putting their case in this way, that the heir-at-law's title came under an alienation made by the daughters without justifying necessity, and that therefore neither he nor his derivative purchasers could hold the property. This Board held that the compromise on its true construction did not mean an alienation, and that it was not right to say that the heir-at-law or the derivative purchasers derived a title from the daughters. It is obvious that to put it as the respondents in that case did, that the purchasers derived title from the daughters, was begging the question. The property belonged to one or other or possibly both of the parties to the dispute, and the compromise proceeded upon the footing that it was uncertain in which of them the title was. As their Lordships put it, it was based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledged and defined what that title was.

It was contended in the present appeal that this Board had laid down in the case of *Imrit Konwar v. Roop Narain Singh* (2), decided in 1880, "that it is clear that daughters could not be bound by a compromise made by the widow under any circumstances"; but it must be remembered what that case really was. In a dispute between a person claiming to be an adopted son of the previous owner and the widow and her daughters who would have titles after her, the widow gave up her daughters' rights in consideration of her own remaining practically unimpaired. Such a compromise obviously could not stand; indeed it is not a compromise at all. If the language in the sentence quoted is rather wide, no one referring to the case in full could be misled by it.

Their Lordships are of opinion that the true doctrine is laid down in *Mohendra Nath Biswas v. Shamsunnessa Khatum* (3)

(1) (1911) L. R. 38 I. A. 87; 13 C. L. J. 575.

(2) (1880) 6 C. L. R. 76.

(3) (1914) 21 C. L. J. 157.

decided in 1914. A compromise made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner will bind the reversioner quite as much as a decree on contest.

This being so, their Lordships proceed to enquire whether this compromise is one that can be supported on these principles. At the outset it is startling one. Assuming as upon the whole appears to be the case, that the two reserved properties were worth Rs. 5,000 for which they were to stand, the widow took for the estate Rs. 66,000, plus Rs. 5,000, or Rs. 71,000 in all, and gave up all but as much, Rs. 70,959. Moreover, her petition to the Court presented in pursuance of the compromise in order to effect the necessary entries on the Court register, states, and the widow herself has stated in evidence, that one of her motives was the fact that the judgment-debtors were related to her and belonged to a respectable family, which she did not wish absolutely to impoverish, and that she gave up her rights after an entreaty by one of the judgment-debtors, who said that he had no property left. On the other hand, it does not appear that the judgment-debtor or debtors had any available property; one was said to have nothing but the house he lived in, which was itself encumbered.

Then comes the question, what was the value of the property released? It would have been easy for either party to have produced evidence nearly conclusive upon this point, but they have failed to do so, and the Courts have been left to a series of inferences. The sub-sales were for Rs. 69,000, and if we are to take it that there was no fraud, it is reasonable to suppose that this would be the full value, not perhaps as between willing purchasers and willing sellers if an undisputed title were conveyed but very likely as much as the widow would have realized if she had re-sold; and if this be the case, all that she has given up is Rs. 3,000. While therefore, giving all weight as against the validity of the compromise to the point that the widow was partially actuated by motives which, however laudable in themselves, did not entitle her to give up property in which she had only a partial interest, their Lordships do not see that a concession of Rs. 3,000 out of Rs. 69,000 to buy off the opposition of the judgment debtors, which had crystallized into a petition of objection, was otherwise than reasonable.

Litigation in respect of this very subject matter had already once taken the widow to the Privy Council, and though the objections of the judgment-debtors were of the stock kind and not likely to prevail, still with judgment debtors who had little or nothing to

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lose it was likely that their objections would have been carried as far as the High Court.

Their Lordships do not find it necessary to consider whether the judgment of the High Court, in so far as it places the burden of proof upon the present appellants, is absolutely and without qualification sound; but upon the facts found by both Courts in India they agree in the conclusion to which those Courts came.

One further observation should be made. It was suggested in argument for the appellants that there was a greater sanctity in immovable than in movable property forming the estate of a deceased Hindu. If this be the case, as to which their Lordships do not find it necessary to pronounce, it would be carrying technicality to an excess to consider this property as immovable property. In the hands of the deceased and in the hands of the widow till the sale it was money secured by a mortgage on immovable property. For a very brief period it might be said that the widow had converted the property by her purchase at the sale; but even this can hardly be said. The sale had not been confirmed and the compromise was upon the very point whether it should be confirmed, that is whether the property should be converted. In these circumstances there is no substance in the suggestion that the compromise is more difficult to uphold because it resulted in an alienation of immovable rather than of movable property.

Their Lordships will therefore humbly advise His majesty that this appeal be dismissed with one set of costs.

Watkins and Hunter : Solicitors for the Appellants.

Truefitt and Francis : Solicitors for Respondent No. 1.

Pugh & Co : Solicitors for Respondent No. 4.

A. T. M.

Appeal dismissed.

PRESENT :—*Lord Buckmaster, Lord Phillimore, Mr. Ameer Ali,
Sir Lawrence Jenkins and Lord Salvesen.*

KAMULAMMAL

v.

T. B. K. VISVANATHASWAMI NAICKER AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Hindu Law—Mitakshara—Inheritance—Sudras in Madras—Illegitimate son—Share.

Under the Mitakshara law in Madras, the illegitimate son of a Sudra inherits one-half of the share to which he would have been entitled had he been legitimate.

In a competition between the legally married widow and the sole illegitimate son, the latter would take a half-share of the inheritance and so he and the widow take equal shares.

Annasawmy Moodelly v. Thandavaraya (1) followed: *Gangabai v. Bandu* (2) distinguished.

Appeal from a decree of the Madras High Court, varying a decree of the Court of the Subordinate Judge of Madura.

The zamindar of Bodinaickenur, a Sudra by caste died in 1888, leaving his widow (the appellant) and an illegitimate son (the 1st respondent) among others as his survivors. He had no legitimate issue. A paper writing was set up by the widow as the last will of her husband but both the Indian Courts found against it. The only question left to be decided in the appeal is whether the illegitimate son was entitled as against the appellant, the legally married widow, to a one-third or a one-half share in the personal or self-acquired properties of the zamindar.

The trial Judge decreed only one-third share: the High Court varied that decree and gave the illegitimate son a half-share. Hence the appeal. The facts are fully set out in their Lordships' judgment.

De Gruyther K. C. and *Dube* for the Appellant: Argued that the Indian Courts were wrong in finding that the properties decreed were the personal or self-acquired properties of the late zamindar: that they constituted part of the zamindari: that the will set up by the appellant was genuine and that the Courts found against on mere suspicion: that the release deed

(1) (1864) Mad. S. R. 11, Norton's L. C. Vol. II 499.

(2) (1915) I. L. R. 40 Bom. 369.

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given by the mother of the 1st respondent as his guardian was a family arrangement and ought to be given effect to : and that the first respondent was not entitled to any relief. If the Court were of opinion that the release deed could not be given effect to for any reason, the first respondent is only entitled to one-third share: *Gangabai v. Bandu* (1). (Various Hindu law texts were also referred to).

Mathew K. C. and *Ingram* for the Respondent No. 1 argued that the alleged will was a spurious document : that the release deed was not intended to and does not interfere with his claim to a share of the zamindar's partible property : that it is not binding upon him : and that according to the Hindu Law texts and the various decisions of the Courts in the Madras Presidency beginning with the decision in *Annasawmy Moodelly v. Tandavaraya* (2), he was entitled to one-half share.

Brown for Respondents 3 to 8 supported the pleas of the first respondent and the decree of the High Court.

The judgment of their Lordships was delivered by

Sir Lawrence Jenkins :—This is an appeal from a decree dated the 26th October, 1915, of the High Court of Judicature at Madras, which varied a decree dated the 14th October, 1905, of the Court of the Subordinate Judge of Madura.

The case started as far back as the 25th April, 1902, and is one of much detail in which numerous issues have been raised ; but the points now in contest have been reduced to two, and it will only be necessary to set forth so much of the complicated story as relates to them.

In December, 1888, Kamaraja Pandiya Naicker, the zemindar of Bodinaickenur, a Sudra by caste, died, and there survived him (among others) his illegitimate son the original plaintiff in the suit, his wife the original 1st defendant, his daughter the second defendant and certain collateral agnates who are parties to the suit. He left no legitimate male issue. The appellant set up a paper-writing as her husband's last will. Both Courts have held it not proved. Though this finding has been questioned in the appellant's case, its propriety is, in their Lordships' opinion, concluded by the concurrent findings of the Courts in India. And so the only point left for decision is whether the plaintiff, as the sole illegitimate son of the late zemindar, was entitled as against the appellant, the lawfully-

(1) (1915) I. L. R. 40 Bom. 369.

(2) (1864) Mad. S. R. 11.

married widow, to a one-third or a one-half share in the personal or self-acquired properties of the zemindar.

The Subordinate Judge decreed only one-third in his favour; the High Court held him entitled to one-half. From this decision the widow has appealed. Both the widow and the illegitimate son have died during the litigation, and representatives have been substituted in their place. The rights of the illegitimate son of a Sudra in the Madras Presidency rest principally on a text of Yajnavalkya as explained and developed in the Mitakshara and other authoritative commentaries.

In the concluding section of Chapter I of the Mitakshara the rights of a son by a female slave in the case of a Sudra's estate are considered. It is conceded that the plaintiff comes within the scope of the section. In paragraph 1 the text of Yajnavalkya is quoted, and in the second paragraph it is interpreted. According to Colebrooke's translation they run as follows:—

"1. The author next delivers a special rule concerning the partition of a Sudra's wealth. 'Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead the brethren should make him partaker of the moiety of a share; and one who has no brothers may inherit the whole property in default of daughters' sons.'"

"2. The son begotten by a Sudra on a female slave obtains a share by the father's choice or at his pleasure. But after [the demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share; that is let them give him half [as much as is the amount of one brother's] allotment. However, should there be no sons of a wedded wife the son of a female slave takes the whole estate, provided there be no daughters of a wife nor sons of daughters. But, if there be such, the son of the female slave participates for half a share only."

The words enclosed in brackets are a gloss by Balambhatta or Subodhini.

Here the contest is between the illegitimate son and the widow and though the widow is not named in the text it is well-settled that as a preferential heir to the daughter's son she is included among those who share with the illegitimate son, and it would serve no useful purpose to speculate why she was not mentioned in the text. But the measure of the respective shares still has to be determined. The text and the commentary speak of the illegitimate son being made partaker of a moiety of a share or participating for

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half a share, but there is no explicit statement as to the unit in which he is to take his half-share. There are two possible views—either that he is to take one-half of the other participant's share, or one-half of what the illegitimate son would have taken had he been legitimate.

Mr. J. R. Gharpure, an able Sanskritist and a vakil of the Bombay High Court, in his recent translation of the Mitakshara, renders the text of Yajnavalkya as providing that the brother should make the illegitimate son "a half sharer"; and his translation of Vijnaneswara's commentary on this text is "these brothers should make that son of the female slave a half-sharer, *i. e.*, they should give him a half from their own allotment." He appends a footnote in which he says this is made clearer by Balambhatta and Subodhini, and gives what purports to be a quotation from Balambhatta and Subodhini in these words, "From the entire estate a half of what would be regarded as his share *i. e.* one-half of the amount allotted to a legitimate issue." Their Lordships have unfortunately had no opportunity of examining these authorities. This rendering "half-sharer," which is not without significance, is also to be found in Rao Saheb Mandlik's translation of Yajnavalkya's text.

In the Savasti Vilasa this text is cited, and the comment on it is in these terms: "The meaning is that even when there is a daughter's son, the son of the female slave takes only a half" (paragraph 396).

The Dattaka-Chandrika, Ch. V. 31. deals with the text as follows, "Therefore if any, even in the series of heirs down to the daughter's son, exist, the son by a female slave does not take the whole estate, but only shares equally with such heir." Though the Dayabhagha is not a governing authority in Madras it is worthy of notice that in commenting on this text Jimuta Vahana lays down that if there be a daughter's son the illegitimate son shall share equally with him, adding the explanation that as no special provision occurs it is fit that the allotment should be equal (Ch. IX, 31.)

The Daya-Krama-Sangraha, another Bengal authority, is to the same effect (VI, 1-35). In Colebrook's Digest the rule is further elaborated, and it is there said that "after the death of the father, if no such will had been declared, the brethren born of a wife legally married shall allot him half a share—that is, half of such share as would have been assigned had his mother been legally

married. Consequently a son by a female slave not superior in class to her Sudra master shall obtain the moiety of a full share."

These last cited commentaries, while not of governing authority in Madras, at any rate show the sense in which the text has been understood elsewhere.

Though in Ch. I. section XII, of the Mitakshara there is no explanation of how the half-share is to be computed, still in another part of the treatise there are directions which indicate the method of computation approved by its author in the ascertainment of fractional shares. Thus in Ch. I. Section VII, paragraph 5, it is provided that "sisters should be disposed of in marriage, giving them as an allotment the fourth part of a brother's own share." In paragraph 6 it is said that the meaning is that the girl shall be allowed to participate for a quarter of such a share as would be assignable to a brother of the same rank with herself. This is worked out in paragraph 7 as follows:—

"For example, if a person had only a Brahman wife and leaves one son and one daughter the whole paternal estate should be divided into two parts and one such part be sub-divided into four: and the quarter being given to the girl, the remainder shall be taken by the son. Or, if there be two sons and one daughter, the whole of the father's estate should be divided into three parts: and one such part be sub-divided into four and the quarter having been given to the girl, the remainder shall be shared by the sons. But if there be one son and two daughters the father's property should be divided into thirds, and two shares be severally sub-divided into quarters; then, having given two quarter shares to the girls, the son shall take the whole of the residue. It must be similarly understood in any case of an equal or unequal number of brothers and sisters alike in rank."

In the second volume of Norton's Leading Cases, p. 499, reference is made to a case of *Annasamy Moodelly v. Tandavaraya* (1), and the ruling is stated in these terms, "Where plaintiff (illegitimate) and defendant (legitimate) were two brothers the property was divided one-quarter to the plaintiff, three-quarters to the defendant." This would be in conformity with the rule of division that would give an illegitimate son one-half of the share to which he would have been entitled had he been legitimate.

Reference, however, has been made to *Gangabai v. Bandu* (2), where it was decided by the Bombay High Court that in a competi-

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(1) (1864) Mad. S. R. 11. Norton's L. C. Vol. II 499.

(2) (1915) I. L. R. 40 Bom. 369.

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tion between the widow and an illegitimate son the son took only one-third. But from the judgment delivered it is apparent that this conclusion was not in accordance with the view that the learned judges took of the text and the commentaries but was founded on what they understood to be the case-law of the Bombay Presidency.

If the true method of computation be to allot to the illegitimate son one half of what he would have taken had he been legitimate then where the competition is between the illegitimate son and the widow the allotment of the respective shares presents no difficulty. Such a son if born of a lawfully wedded wife would have taken the whole; by reason of his illegitimacy this would be reduced to one half; and so he and the lawfully-married widow would take in equal shares.

In Madras this result, according to the judgment of the High Court now under appeal has the support of the case-law of that Presidency, and it was definitely stated in the course of the present argument without being controverted, that as between an illegitimate son and a lawfully-wedded widow there has been no departure in Madras from the rule of equal shares.

The learned Judges of the High Court, after a reference to the decisions say, "In this state of things we are not prepared to depart from the course of decisions in this Court, which hold that the plaintiff is entitled to share equally with the widow." This, in their Lordships' opinion, was the right conclusion at which to arrive, and they will accordingly humbly advise His Majesty that this appeal be dismissed with costs. There will be only one set of costs.

Hy. S. L. Polak : Solicitor for Appellant.

D. Graham Pole : Solicitor for Respondent No. 1.

Douglas Grant : Solicitor for respondents 3 to 8.

K. V. L. N.

Appeal dismissed.

PRESENT : *Lord Buckmaster, Lord Phillimore, Sir John Edge
and Lord Salvesen.*

SAHDEO NARAIN DEO AND OTHERS

v.

KUSUM KUMARI.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA].

*Hindu Law—Aboriginal Bhuiyas—"Chowrasi" gadis—Succession—Adoption—
Special custom—Property situate in Sonthal Parganas—Bhagalpur Court—
Jurisdiction—Regulation III of 1872—Impartible estate.*

The holders of "Chowrasi gadis," of which Lachmipur Raj is one, claim to be Surjabansi Rajputs and as such high caste Hindus. They are really descendants of aboriginal Bhuiyas who had become Hindus long ago. On the question whether an adopted son succeeds to the gadi, either by law or custom:

Held, that this clan of Chowrasi gadis had adopted in general not only Hindu religion and Hindu social usages, but also the Hindu law regulating succession to landed property, though they still retain some relics of non-Hinduism.

Held, also on the evidence that the custom of excluding adopted sons from succession was not established. *Farindra Deb Raikar v. Rajeswar Das* (1); *Muhammad Ibrahim Rowther v. Shaikh Ibrahim Rowther* (2); *Palaniappa Chettyar v. Alayan Chetti* (3) distinguished.

An estate only becomes impartible by custom, and the custom has in each case to be proved.

Custom of impartibility and succession of nearest of kin discussed and distinguished.

Decision on the question whether, under Regulation III of 1872 relating to Sonthal Parganas, Bhagalpur had jurisdiction to try the suit, part of subject matter being situate in Sonthal Parganas considered unnecessary.

Appeal from a decree of the Patna High Court, affirming a decree of the Additional Subordinate Judge of Bhagalpur.

The suit was brought by the appellants to recover the Lachmipur Raj as the half-brother of the last holder, against the defendant who was in possession as the adopted son of the last holder. The question was whether by law or custom obtaining in the clan to which the parties belong, adopted sons were excluded from succession to landed property. Both Courts in India held that they had adopted the Hindu law of succession and dismissed the claim. Hence the appeal.

(1) (1884) L. R. 12 I. A. 72; I. L. R. 11 Calc. 463.

(2) (1922) L. R. 49 I. A. 123; 36 C. L. J. 64.

(3) (1921) L. R. 48 I. A. 539; I. L. R. 44 Mad. 740; 26 C. W. N. 417.

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The facts of the case and the purport of the argument is fully set out in their Lordships judgment.

De Gruyther K. C., Dunne K. C. and Dube for the Appellants.

Sir George Lowndes K. C., Brown and Mc Nair for the Respondent.

The Judgment of their Lordships was delivered by

Lord Phillimore:—The question to be decided in this case is whether the succession to an impartible estate, called the Lachmipur Raj, devolved upon the adopted son of the last owner, or upon his nearest collateral blood relation. The action was brought by two half-brothers, claiming in the alternative that one or other was entitled to succeed according to the rule of primogeniture established for this property (with a third plaintiff, the assignee, for value of part of their claims), to recover possession from the defendant, who alleged that he was the adopted son of the last holder. Various points were raised as to the fact and regularity of the adoption, but these were disposed of in the course of the case in favour of the defendant. The plaintiffs' main case, however, was that there was a "family or clan custom which forbids and bars inheritance by adoption," or, as counsel for the plaintiffs has invited their Lordships to look at the matter, that the succession to this estate is not regulated in any sense by Hindu law, but wholly by custom, which custom has no place in it for adoption, or, alternately, for the succession of an adopted son.

The Lachmipur Raj, is situated in N. W. Bengal in the district of Bhagalpur part of it extending into the Santhal Parganas. A point was raised in the case that by reason of Regulation III of 1872, relating to these Parganas, the Court of the Subordinate Judge at Bhagalpur had no jurisdiction to try it, even though the plaintiffs abandoned that part of their claim which related to the portion in the Sonthal Parganas.

This view was taken in the High Court, and, if it be correct, is at once fatal to the case of the plaintiffs. It seemed, however, to their Lordships not so plain, on first impression, that this decision was correct, and counsel for the respondent desiring to have the matter tried upon the merits, their Lordships have heard the argument upon the merits without further discussion of the preliminary question of jurisdiction, and as upon the merits they have come to a conclusion, in accordance with that of both Courts below, that the plaintiffs have failed to make out their case, they do not deem it necessary to enquire further into the question of jurisdiction.

The Lachmipur estate appears to be one of several which are comprised under the term, the 84 gadis called Chowrasi—apparently a form of the vernacular word for 84. The holders of these gadis all claim to be Surjabansi Rajputs, and, as such, high-caste Hindus. They differ, however, in some customs, social and otherwise, from ordinary high caste Hindus, and it is now said of them by the plaintiffs that they are really descendants of an aboriginal tribe called Bhuiyas, who have assimilated the manners of Hindus for many generations, and, having had fictitious pedigrees made out for them by Brahmins, now claim to be Rajputs. Certainly the bulk of the inhabitants in the district are Bhuiyas, and though it is possible that these particular gadi holders may be lineal descendants of Rajput invaders and conquerors, the High Court has proceeded on the footing that they are by descent Bhuiyas. Their Lordships, without pronouncing upon the anthropological question will assume as the assumption is favourable to the plaintiffs, that this clan or collection of families, and in particular the family in which this estate has been held, are aboriginal Bhuiyas. The question then will be whether in matters of succession they have retained their aboriginal customs, or have adopted Hindu law, in whole or in part and specifically whether by law or custom the succession of an adopted son is admitted.

Upon this point the plaintiffs have the decision of both Courts in India against them, and if the point to be decided is to be regarded as a question of pure fact, this would in an ordinary case be enough to dispose of the appeal. But it is said that the Subordinate Judge disqualified himself from coming to a correct conclusion, because he omitted all consideration of the origin of the family, and that both he and the High Court erred in law in putting the burden upon the plaintiffs, whereas it ought to have been put and put strongly upon the defendant. This latter argument depends upon a consideration of the decision of this Board in the case of *Fanindra Deb Raikat v. Rajeswar Dass* (1), and as it is upon this case that the appeal is founded, it is desirable to deal with it *in limine*. It turned upon the question whether the custom of adoption and succession by adoption was admitted in a family of the Koch tribe, who had begun to designate themselves as Rajbansis, and for social purposes affected to be Hindus. This Board came to the conclusion that, though they affected to be Hindus, they were not generally governed by Hindu law, but had retained and were governed by family custom, which as regards some matters was at variance with the Hindu

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law ; and this Board held that the High Court had been wrong in holding that the question was "whether the general Hindu law was modified by a family custom forbidding adoption," and that the real question was "whether with respect to inheritance the family is governed by Hindu law or by customs which did not allow an adopted son to inherit." Having thus stated the question, their Lordships came to a conclusion upon the evidence agreeing in this respect with the Judge of first instance, and disagreeing with the High Court, that without regarding the burden of proof the facts showed that no succession by way of adoption was admissible. They summed up their judgment by saying :—

"Whether, if the Baikunthpur family were shown to have become Hindus out and out saving only special customs, such evidence would be sufficient to prove a special custom need not be discussed here. The family is in a totally different position. And their Lordships have no hesitation in holding that whatever Hindu custom may have been introduced into it, the custom of succession by adoption has not been introduced."

The effect of this decision is stated in *Muhammad Ibrahim Rowther v. Shaikh Ibrahim Rowther* (1), where their Lordships express themselves as follows :—

"The question at issue was whether in the family then under discussion there was a legal power to adopt. Had its members been Hindus they would have been governed by Hindu law, and there would have been this power. But though they affected to be Hindu, that in fact was not their status ; the utmost that could be said was that, though the family had introduced many Hindu customs, they in fact were governed by family customs. Of such a family it was manifestly appropriate to remark that 'the question is not whether the general law is modified by a family custom forbidding adoption, but whether with respect to inheritance the family is governed by Hindu law, or by customs which do not allow an adopted son to inherit.'"

Upon the principle thus laid down, the proper enquiry is whether this family can be said to have become so far Hindu as to throw the burden of proof upon the plaintiffs, or whether the opposite conclusion should be come to, which would throw the burden upon the defendant.

A great mass of evidence was given in the case, mostly on the specific question of the custom of adoption, but, incidentally, with regard to the other customs of the family or clan of Chowrasi gadis.

(1) (1922) L. R. 49 I. A. 123.

But before coming to this evidence their Lordships would wish to begin at the beginning, and see the account which the plaintiffs, other than the assignee, give of themselves. Their plaint, filed on the 18th September, 1907, said that either of the claimants was "a Hindu governed by the Benares school of Hindu law"; that the Lachmipur estate was an impartible Raj, the succession to which was governed by a family custom or Kula char; that it was one of 84 gadis "owned and possessed by Surjabansi Rajputs of the same clan" as the deceased, which went by the collective name of Chowrasi; and that among the holders of these gadis there was a "family or clannish custom which forbids and bars inheritance. By adoption and the succession to these gadis by blood relations cannot be defeated by adoption." This allegation made in paragraph 5 is repeated in paragraph 11. It should be added that in paragraph 3, when dealing with the rights of a widow who came into the line of succession, she is said to have come into possession "with the limited rights of a Hindu widow succeeding to the property of her deceased husband under the Benares school of Hindu law."

In accordance with this contention, the issue framed in respect of this matter was stated as follows: "Is the Lakshmipur Estate one of the alleged 84 Gadis called Chowrasi, as stated in paragraph 5 of the plaint, and governed by a family or clannish custom by which adoption is forbidden and which bars inheritance by an adopted son? Is such a custom valid?" And upon that a large part of the evidence had been given when, on the 26th July, 1915, an application was made by a petition presented on behalf of the plaintiffs of which the following passages are important:—

"1. That the plaintiffs have within the last week come to know from a very authoritative source that the ancestors of the late Thakur Lalit Narain Deo were originally non-Hindus, and in course of time adopted only certain rules of Hindu law and called themselves Hindus.

"2. That this fact was never known to the plaintiffs herebefore until one of them was shown an extract from the report of the Settlement operation Sonthal Parganas, by H. McPherson, Esq, a true copy of which is annexed herewith.

"3. That on account of the fact mentioned in paragraph 1 of this petition it is essentially necessary that the plaint should be amended at certain places which are more fully stated below.

"4. That the plaintiffs, therefore, pray that the following amendments may be made in the plaint, namely that (1) in paragraph 1 the words 'who was a Hindu governed by the Benares School of

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Hindu Law' after describing Thakur Lalit Narain Deo of Lachmipur be omitted and struck off.

"(a) In paragraph 3 the words 'under the Benares School of Hindu Law' at the end of the paragraph, be struck off.

"(b) That after paragraph 1 the following paragraph may be inserted and added as paragraph 1 (a) :—

" 'That the ancestors of the said Thakur Lalit Mohan Deo belonged to a tribe called the Bhuiyas and were originally non-Hindus who in course of time adopted certain customs and practices in vogue amongst Hindus after they settled down in that part of the country where the Estate Lachmipur is situate.' "

Then followed certain consequential alterations which were also said to be important. This petition was supported by an affidavit, but it is remarkable that the affidavit was only made by by the assignee, and it may well be doubted whether any inducement would have led the original claimants to commit themselves by oath to the statements in paragraph 1 of the petition. The application made in this petition was refused by the Subordinate Judge, and his action was approved by the High Court, and in their Lordships' view, rightly ; and this puts the plaintiffs into a great difficulty. But the Judges in the High Court thought that nevertheless it was possible for the plaintiffs to go into the question of the origin of their community, and, as already stated, they held that indications pointed to the holders of these gadis being as a group originally indigenous, and having at some time not known accepted Hinduism. The High Court Judges place this acceptance somewhere near the beginning of the nineteenth century. At any rate, there are many decisions which unquestionably proceed upon the footing that Hindu law, according to the school of Benares that is the Mitakshara—was of general application to these Chowrasi gadis. Their Lordships listened to an analysis of such of these cases as counsel for the appellants thought could be scrutinised usefully, and they see no reason to qualify the conclusions of the High Court.

To sum up this part of the case, the combination of the the plaintiffs' own statement, the oral evidence and the judgments in former cases is, in their Lordships' opinion, sufficient to justify the conclusion of the High Court that this clan, even supposing its origin to be not Hindu, had adopted in general not only Hindu religion and Hindu social usages, but also the Hindu law regulating the succession of landed property and this though, as the Judges held, "there were still some relics of non-Hinduism."

It was suggested for the appellants that this conclusion was not enough, that if it could be proved that there was a customary law of succession before these people became converted to Hinduism that custom could not be abrogated by conversion.

Now this case does not deal with modern conversion, but with a conversion which is at least 100 years old, and the Indian Courts and this Board have with regard to these ancient conversions admitted the possibility that they might carry with them abrogation of former customs. Thus, in the case in 12 I. A. already cited, it was an accepted matter that the family was of non-Hindu origin, but their Lordships nevertheless embarked upon the enquiry whether they had become Hindus "out and out"; and in the recent judgment of this Board in *Palaniappa Chettiar v. Alayan Chetti* (1), it was accepted as an explanation of the custom of Putrabhaga, according to which the sons of each wife formed a class and the classes divided the inheritance, instead of the individual sons, that it was probably due to the Dravidian origin of the people in question, who had retained some of their non-Hindu customs, though they had become Hindus and were governed by general Hindu law. In that case authority was cited for considering a mass of tribes in Southern India as having become Hinduised and subject to the law of the Smritis in most respects, though still adhering to particular customs.

The High Court, therefore, was right in treating it as a thing possible in law that this clan on the assumption that it was originally non-Hindu, had become sufficiently Hindu to make succession by adoption, even if non-existent in non-Hindu times come in with the rest of Hindu law, though the custom of non-adoption might be a survival, as in *Palaniappa Chettiar v. Alayan Chetti* (1).

The High Court, however, without applying any principle as to the burden of proof, leaving that question open, came to a decision unfavourable to the appellants, and, after giving due weight to the criticism of the judgment of the Subordinate Judge, which counsel for the appellants has administered, their Lordships see no reason why the two judgments should not be treated as concurrent findings of fact, or why they should not stand. But as the case is important, they will go with some detail into the reasons which lead them independently to the same conclusion.

It is said for the appellants that there were a great number of cases where, if adoption had been the custom, it would have taken place, and they support this argument by saying that weight

(1) (1921) L. R. 48 I. A. 539, I. L. R. 44 Mad. 740; 26 C. W. N. 417.

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was given to a similar argument in 12 I. A. (1) There is force in this contention, though there are counter observations to be made. But in the case in 12 I. A. there was no single instance of adoption carrying succession whereas in the case now before the Board there were certainly some instances, though not very many, proved. And more remarkable still, the defendant was adopted with much publicity and solemnity as far back as 1885, and was installed on the gadi with considerable pomp in February, 1902, and no protest or objection appears to have been raised. Moreover, later on he was with almost equal solemnity outcasted, in February, 1907 because he consorted with another outcaste, and in the document recording his sentence he is described every time his name is mentioned as "the adopted son Pratab Narayan Deo." This document is signed by nearly all the great men of the clan. After this, it is not altogether surprising that the very eminent counsel who appeared for the appellants in the High Court felt himself as it were, driven from his other arguments, and took up the position that adoption might indeed be permissible, but that succession to the estate did not follow from the adoption. It was open to him to take this point without abandoning his other contentions, but the position would be so unusual, and so contrary to Hindu ideas, that if the appellants were driven to this their chance of success was small.

It was urged that there was here a plain departure from Hindu law inasmuch as the estate, instead of descending to all the sons of a previous holder, was impartible. It is true that an estate only becomes impartible by custom, and that the custom has in each case to be proved. But it is a custom which is usually found to exist where the estate belongs to a King or independent Chief, or even a semi-dependent Chief of sufficient importance.

The Prince, to use a neutral term, regards the whole estate which his predecessor had as necessary for the support of his dignity or gadi, and he takes it of his princely power and keeps it, giving appanages or maintenance to the junior members of the family. The custom of impartibility in such a case affords no indicia whereby to determine that a family does not follow Hindu law as a whole. Regulation X of 1800, points to the frequency of this custom among Hindus in parts of Bengal.

It was further argued that where estates are impartible they usually descend to the nearest of kin and not in lineal primogeniture, and that here again was a departure from Hindu usage. This was

(1) (1884) L. R. 12 I. A. 72.

disputed, and their Lordships were not invited to make any profound search into the question. Again, however, the case originally made by the plaintiffs appears to get in the way of and trip up their later arguments, for in the plaint (paragraph 2) it is stated that the family custom is "governed by the ordinary rule of lineal primogeniture," the only departure suggested being that a junior son by a senior wife is preferred; and this latter assertion was held not to be proved.

Upon the whole, their Lordships, after giving full attention to the very interesting argument of counsel for the appellants, have come to the conclusion that there is no reason to interfere with the decision arrived at in the Courts below, and they will humbly recommend His Majesty that this appeal should be dismissed with costs.

Fugh & Co : Solicitors for Appellants.

Morgan Price, Gordon & Marley : Solicitors for Respondent.

K. V. L. N.

Appeal dismissed.

PRESENT : *Lord Buckmaster, Lord Atkinson, Lord Sumner,
Lord Carson, and Sir John Edge.*

RAI BAHADUR CHHOTAY LAL

v.

THE COLLECTOR OF MORADABAD.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT ALLAHABAD].

*Registration—Document, presentation of—Registration Act (XVI of 1908),
Secs. 32 Sub-sec. (c) 35, 75 Sub-sec. (2)—Power of attorney—Imperfectness—
Burden of proof—Duly presented—Repetition of original steps—Endorsement
on a document by registering officer.*

The Registration Act has imposed several conditions regulating the presentation of documents for registration and those conditions, framed with a view to meet local circumstances should not be weakened or strained on the ground that they may appear to be exacting and strict.

If the mortgagor does not attend to admit execution, the Sub-Registrar is bound under section 35 of the Registration Act to refuse to register, leaving the interested parties to appeal to the Registrar under section 73 : *In re Shaik Abdul Aziz* (1) approved.

(1) (1887) I. L. R. 11 Bom. 691.

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The power of attorney mentioned in sub-section (c) of section 32 of the Registration Act must not be general in its form, but must confer the special authority to present on behalf of the principal, and even though the Sub-Registrar accepts the presentation under a general power of attorney, it is open to any interested party to show that the power of attorney was in fact imperfect: *Jambu Parshad v. Muhammad Aftab Ali Khan* (1). The fact that the presentation is accepted by the Sub-Registrar as in proper form is, however, *prima facie* evidence that the conditions have been satisfied; and after such acceptance, the burden of proving any alleged informality rest on the person who challenges the registration.

The endorsement on a document by the Sub-Registrar has no statutory effect; it is only the evidence to show that the presentation has been accepted by the Sub-Registrar, and its acceptance by him, he being the officer whose business it is to see that all essential regulations are regarded is *prima facie* evidence that the document was regular in all respects.

The expression 'duly presented' in sub-section (2) of section 75 of the Registration Act means "presented in accordance with all the formalities imposed by section 32." This sub-section is mandatory and compels the registering officer to effect the registration if the document be duly presented. If this procedure be followed and registration is refused, the processes of the Court are open for the purpose of compelling obedience, a privilege that would not be enjoyed if the formalities were omitted.

There is nothing in section 75 of the Registration Act to prevent the Registrar or the Sub-Registrar from registering a document which had been duly presented, and the execution of which has been proved, without requiring a repetition of all the original steps, but he cannot be compelled to register unless the document be 'duly presented' a second time.

Appeal from the decree of the High Court of Allahabad.

The material facts appear from their Lordships' judgment.

De Gruyther, K. C. and *Dube* for the Appellant.

Dunne K. C. and *Brown* for the Respondent.

The judgment of their Lordships was delivered by

July, 11.

Lord Buckmaster:—On the 20th November, 1911, Maulvi Maqbulur-Rahman executed a mortgage of considerable property in the district of Meerut in favour of Sahu Parshadi Lal, to secure repayment of Rs. 10,000 and interest. The mortgagor subsequently executed several transfers of the mortgaged property, some by way of mortgage and some apparently by way of absolute transfer.

The appellant claims under one of such transfers, but the extent and character of his interest is nowhere stated, nor need it be investigated as it is admittedly sufficient to support the appeal. He contends that the mortgage of the 20th November, 1911, was not

(1) (1914) L. R. 42 I. A. 22; I. L. R. 37 All. 49; 21 C. L. J. 218.

properly registered in accordance with the provisions of the Indian Registration Act XVI of 1908, and is consequently invalid.

The respondent is the Manager of the Court of Wards, acting on behalf of the three infant children of the mortgagee, who died on the 8th February, 1912.

That the mortgage required to be registered is plain. The only question is, was registration effected? The facts are these. The mortgage was presented for registration before the Sub-Registrar of Moradabad on the 5th February, 1912, by Pandit Nanak Chand acting under a power of attorney, and was received by him. The mortgagor did not attend to admit execution, and on the 28th February, 1912, the Sub-Registrar refused registration, making an endorsement on the deed in the following terms: "Under section 35, Act XVI of 1908, registration refused." Section 35 relates solely to the admission of execution of the deed, and as the mortgagor did not appear, the Sub-registrar was bound to take the course he did, leaving the interested parties to appeal to the Registrar under section 73 [see *In re Shaik Abdul Aziz* (1)]

It will, therefore, be noticed that the reason why registration was refused had nothing to do with defect in presentation; but as it is now asserted that the original presentation was irregular, it is important to examine the facts and statutory provisions upon that head. The Registration Act has imposed several conditions regulating the presentation of documents for registration, and it is of great importance that those conditions, framed with a view to meet local circumstances, should not be weakened or strained on the ground that they may appear to be exacting and strict.

Section 32 is the first section dealing with the matter, and it is in the following terms:

"32. Except in the cases mentioned in section 31 and section 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office,

"(a) by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or

"(b) by the representative or assign of such person, or,

"(c) by the agent of such person, representative or assign, duly authorised by power of attorney executed and authenticated in manner hereinafter mentioned."

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The exceptions mentioned in sections 31 and 89 need not be considered as they have nothing to do with the present case.

Presentation here was not made in person ; it was made under sub-section (c) by an agent purporting to be authorised by a power of attorney. Such power of attorney must not be general in its form, but must confer the special authority to present on behalf of the principal, and even though the Sub-Registrar accepts the presentation under a general power of attorney, it is open to any interested party to show that the power of attorney was in fact imperfect. [See *Jambu Parshad v. Muhammad Aftab Ali Khan* (1)]. The fact that the presentation is accepted by the Sub-Registrar as in proper form is, however, *prima facie* evidence that the conditions have been satisfied ; and after such acceptance, the burden of proving any alleged informality rests on the person who challenges the registration. In the present case no question arises upon the character of the power ; it has not been put in evidence and having been formally accepted by the proper official it may be regarded as complying with the provisions as to its character imposed by section 32, subsection (c).

By Section 33, however, special conditions are established with regard to the execution of such a power of attorney. This section provides that certain powers of attorney shall alone be recognised, viz., subsection (a) :—

“(a) If the principal at the time of executing the power of attorney resides in any part of British India in which this Act is for the time being in force, a power of attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides.”

It is said that in this case that condition has not been satisfied, because the Sub-Registrar's certificate, which was endorsed on the document on the 5th February, 1921, in the following terms :—

“Presented by Pandit Nanak Chand, son of Pandit Tara Chand, caste Brahman, professional lawyer, resident of Moradabad, muhalla Raja Gali, at the office of the Sub-Registrar, Moradabad, this 5th day of February, 1912, between the hours of 3 and 4 p. m. on behalf of Sahu Parshadi Lal under a special power of attorney duly authenticated in this office on 3rd February, 1912.

“(Signed) SHAM BEHARI LAL, officiating S. R.”

does not refer to the fact that the power of attorney was executed before the Sub-Registrar. The endorsement is certainly lax in this respect, but it is made under no statutory obligation, and it has no

statutory effect; it is only the evidence to show that the presentation has been accepted by the Sub-Registrar and its acceptance by him, he being the officer whose business it is to see that all essential regulations are regarded, is *prima facie* evidence that the power of attorney was regular in all respects. So far as the original presentation is concerned, therefore, their Lordships think that there is nothing to displace the inference that it was duly made, arising from the fact of its acceptance by the Sub-Registrar. His refusal to register was due to the circumstances which have already been narrated, and in due course appeal was had to the Registrar by the present respondents.

On the 28th June, 1912, the District Registrar ordered registration, following upon which, on the 22nd July, the Collector of the Court of Wards forwarded the mortgage and the copy of the Order by post to the Sub-Registrar and asked for registration. The Order of the 28th June, 1912, removed the difficulty that prevented registration in the first instance, and accordingly, on the 23rd July, 1912, the Sub-Registrar accepted the document for registration and made upon it the following endorsement:—

“Having seen the Order of the District Registrar, Moradabad, dated 28th June, 1912, I have satisfied myself that the execution of the document was proved before the said officer, and the document is therefore accepted for registration.

“(Signed) SHER SINGH, officiating S. R.

“23rd July, 1912.”

And it was registered accordingly.

It is objected that such registration was bad because the presentation to the Sub-Registrar after the District Registrar's order ought to have been made with the same formalities as those necessary for the original presentation, and this, according to the appellant's contention, is the only meaning that can be given to sub-section (2) of section 75, which is in the following terms:—

“75.—(1) If the Registrar finds that the document has been executed and that the said requirements have been complied with he shall order the document to be registered.

“(2) If the document is duly presented for registration within thirty days after the making of such Order, the registering officer shall obey the same, and thereupon shall so far as may be practicable, follow the procedure prescribed in sections 58, 59 and 60.

“(3) Such registration shall take effect as if the document had been registered when it was first duly presented for registration.”

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The weight of this argument depends upon the phrase "duly presented," and it is pointed out that the subsequent use of the same words in subsection (3) shows that "duly presented" means presented in accordance with all the formalities imposed by section 32.

Their Lordships are not prepared to differ with this reasoning, but it does not conclude the case in the appellant's favour. Upon the hypothesis that section 75, sub-section (2), may be dealing with a case such as the present, in which original presentation has been properly made, and in these circumstances, and as every condition has been satisfied, there would, in their Lordship's opinion, be nothing to prevent the District Registrar, when he had determined the question of execution, from directing that the registration should then be made. The last words in subsection (3), which provide that the registration shall date back, do not necessarily refer only to a registration effected pursuant to the provision of sub-section (2), but to every registration consequent on the order made by the Registrar. The main point about sub-section (2) is that it is mandatory in form and compels the registering officer to effect the registration if the document be duly presented. If this procedure be followed and registration is refused, the processes of the Court are open for the purpose of compelling obedience, a privilege that would not be enjoyed if the formalities were omitted. Their Lordships can find nothing in the section to prevent the Registrar or the Sub-Registrar from registering a document which had been duly presented, and the execution of which has been proved, without requiring a repetition of all the original steps, but he cannot be compelled to register unless the document be "duly presented" a second time. There are many mischiefs against which the statute was designed to afford protection in requiring obedience to the provisions for presentation in the first instance, but when once the execution of the document has been proved, and the original conditions for presentation complied with, there is no reason why they should all be repeated.

For these reasons their Lordships think that the conclusion to which the High Court have arrived is correct, although they are not prepared to accept all the reasoning by which that conclusion is supported, and they will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Douglas Grant : Solicitor for the Appellant.

Solicitor, India Office : Solicitor for the Respondent.

A. T. M.

Appeal dismissed.

PRESENT: *Lord Phillimore, Lord Carson, Sir John Edge, and Mr. Ameer Ali.*

KUNWAR SARDAR SINGH AND OTHERS.

v.

KUNJ BEHARI LAL AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT ALLAHABAD.]

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May, 11, 12.
June, 30.

Alienation—Hindu female—Dedication—Creation of permanent benefit—Religious purpose—Small portion of property.

Hindu system recognises two sets of religious acts. One is in connection with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul.

With reference to the first class of acts, the powers of the Hindu female who holds the property are wider than in respect of the acts which are simply pious and, if performed, are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case she can alienate a small portion of the property for the pious or charitable purpose she may have in view.

The Hindu law recognises the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner.

A dedication of one-seventy-fifth of the property by a Hindu female for the observance of *bhog* or food offerings to God Jagannath, installed in the temple at Jagannathpuri, and for the maintenance of the priests (Pandas) who are charged with the performance of that duty, is not in excess of her powers, and is valid.

Appeal against the decision of the Allahabad High Court, dated the 6th June, 1918, reversing that of the Subordinate Judge of Moradabad. The Court of first instance held the gift was invalid; but this decision was reversed. Hence the plaintiffs appealed to His Majesty in Council.

De Gruyther K. C. and *Dube* for the Appellants.

Lowndes K. C. and *Brown* for the Respondents.

The judgment of their Lordships was delivered by

Mr. Ameer Ali:—This is an appeal from a judgment and decree of the High Court of Allahabad, dated the 6th June, 1918, and arises out of a suit brought by the plaintiff Laltu Singh, since deceased, in the Court of the Subordinate Judge of Moradabad on

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13th September, 1913. The object of the suit was to set aside an alienation purporting to have been made for a religious or pious, purpose by a Hindu lady of the name of Rani Kishore on the 8th January, 1876. The point involved in the determination of the appeal relates to the powers of a Hindu female on whom property devolves upon the death of the husband, son or father, as a limited estate to alienate any part of the property for religious purposes. Rani Kishore was the widow of Raja Gur Sahai, who died in 1868 and was at the time of his death possessed of a considerable estate, yielding an annual income of some Rs. 60,000. He left two minor sons, both of whom died in infancy in 1873, five years after the death of their father. The property then devolved on Rani Kishore in succession to her sons. The Rani died on the 16th August, 1907, when succession opened to the reversioners of Raja Gur Sahai. There was some litigation as to the right of reversion, which was finally adjudged in favour of Laltu Singh, the plaintiff, and he, as stated before brought the suit on the 13th September, 1913, to set aside the alienation referred to above. It appears, upon the evidence, that after the death of her sons the widowed mother, according to the custom of pious Hindus especially females made pilgrimages to different sacred cities among them Benares, Gya and Puri. She appears to have visited Puri in the year 1875 and there made a sankalpa or vow to create a dedication for the observance of *bhog* or food offerings to the presiding deity and for the maintenance of the priests (*pandas*) who were charged with the performance of that duty. In 1876 she gave effect to her sankalpa by executing as it is alleged on behalf of the defendants, a document purporting to be a gift for the purpose referred to. That document so far as is material for the purposes of this judgment is in the following terms:—

"I, Mussammat Rani Kishori Kunwar, widow of Raja Gur Sahai, deceased, by caste a Jat, 'rais' and resident of Moradabad, do declare as follows:—

"Whereas I, according to the custom prevailing among the Hindus, happened to go on a pilgrimage to Prayagji and Kashiji and on a visit to Jagannath in 1282 Fasli, and at the time of paying a visit to, and performing the worship of Jagannathji Maharaj, made a charitable gift and 'shankalpa' of a moiety of a 'pucca' built house facing the east in muhalla Sambhal Darwaza in Moradabad and of a 15 biswa 9 biswansi 2 kachwansi 3 tanwansi share in mauza Sherpur, a 15 biswa 9 biswansi 2 kachwansi 3 tanwansi share in Sarai Kazi, a 15 biswa share in Rustampur Hayat and a 15 biswa share in

Sahjahanpur Hayat, the zemindary villages in pargana Hasanpur, together with all the culturable and unculturable lands, 'abadi,' houses that are let on rent, artisan's cess, grazing charges, barren land, water produce, tanks, lakes, groves, fruits and timber trees *i.e.*, all the inherent and adventitious rights and interests in the revenue paying zamindari property in the said villages and also of two pucca 'havelis' (houses) in mauza Sherpur aforesaid in favour of Jagannathji Maharaj, installed in the temple at Jagannathpuri and of Anant Ram, son of Gobardhan, 'khurd' (junior), resident of Puri, aforesaid, and Jai Ram, son of BhawaniDas, resident of Durgapur, appertaining to Puri aforesaid district Katak, both the Pandas of Jagannathji Maharaj. But no document was executed at the time the 'sankalp' was made. Now this document is executed with the following conditions:—Both the Pandas aforesaid should enter into possession and make management of the aforesaid property and after paying the Government revenue and village expenses out of the annual income, spend half of the net profits on the daily 'bhog' (food offering) of Jagannathji Maharaj, and bring the other half to their own use, in equal shares. After them, their descendants and successors should enter into possession and enjoyment, generation after generation, and should, in due order, distribute the profits, according to the specification given above and daily spend money on the 'bhog' of Maharaj. Whoever will be my successor and representative after me shall have no claim or objection to the gifted and endowed property, by reason of the execution of this deed. If, perchance, they bring any claim it shall not be entertainable by the court, inasmuch as the property of which I have made a charitable gift and 'shankalp' is of the nature of 'devatra' (?) and 'tuisipatra' property. According to the Hindu Law, the income of the said property is not such as may be brought by me or my successors to our own use. The said property is the self-acquired and exclusive property of my deceased husband, Raja Gur Sahai. I have made a charitable gift and 'shankalp' of the property for the salvation of my husband and his family members and for my own salvation. The gift property is worth Rs. 2,500. I have therefore, executed these few presents by way of a deed of gift, so that they may serve as evidence and be of use when needed.

It purports to have been executed for the lady by her general attorney Ajab Singh, and a question was raised on behalf of the plaintiffs that the deed of gift was fraudulently executed by Ajab Singh in collusion with the donees and was not the act of the Rani

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herself. In the view he took of the case the Subordinate Judge did not deal with the question of the authenticity of the document, but the High Court, on the examination of the evidence, came to the conclusion that the deed was the deed of Rani Kishore. The contention against the genuineness of the document has not been pressed before the Board, and their Lordships think upon the evidence there is no real foundation for the charge that it was not the act of the Rani. Before the first Court the trial proceeded on the question of the power of the lady to make an alienation, the plaintiff contending that it was invalid while the defendants urged that it was fully within her competency. The Subordinate Judge decided in favour of the plaintiffs on two grounds—first, that it was not competent for the lady to make the alienation, as it was not for the performance of any religious duty, which amounted to a necessity under the Hindu law; the second ground of his decision was that the lady had abundant means for giving effect to her pious intention, the *sankalpa*, to which she refers in the deed of gift, and that consequently the gift was invalid. He accordingly made a decree in favour of the plaintiffs. On appeal the High Court came to a different conclusion. They held that her alienation, although not in performance of a necessary duty, was nevertheless a pious act and was, therefore, valid. They held also that the lady had inherited a large estate, and that the dedication covered a very small fraction of the property, something like one-seventy-fifth. They accordingly dismissed the plaintiff's suit.

On appeal to the Board the question has been argued with great ability and fullness by counsel for the appellants who are Laltu Singh's representatives.

The earlier cases bearing on the question cited from Sutherland's Weekly Reporter, extending from 1864 to 1873, no doubt give colour to the view taken by the Subordinate Judge and their Lordships have little doubt that he was largely influenced in his conclusion by the notion that justifiable necessity for the validity of religious alienation must be of the same character as in the case of alienation for secular purposes. This idea seems to be predominant in the minds of the learned Judges who decided the cases reported in the Weekly Reporter. Their Lordships cannot help regarding the criticism of the High Court on the Subordinate Judge's judgment as unduly severe. In support of the plaintiffs' contention the Board were referred to the paragraph 105 in the *Vyavastha Chandrika* (Vol. I p. 138):—

"Without the consent of her husband's reversioners a widow is, however, competent to sell so much, and no more, of his property as may be required for the performance of the indispensable duties (nitya-karma). If such acts cannot be performed without selling the whole property the whole may be sold by her for that purpose because such duties *must* be performed. But for the performance of an optional religious act (Karma karma) she may, without their consent dispose of only a small portion of the estate."

Then follows paragraph 106, which, it is contended, imposes a further limitation on her power :—

"If, however, the expenses for those acts including maintenance could possibly be defrayed with the accumulated wealth, or with the income of the estate, left by the deceased, then his widow cannot sell any part of his estate for the performance of any such act, much less on account of any debt contracted by her for her own purpose."

The commentator's note to paragraph 105 is as follows :—

"An indispensable act or duty (nitya-karma) is that which *must* be performed and cannot be neglected without sinning, as the first *śradhā* of the father or of the husband, the marriage of his daughter, or the like. And an optional religious act is such as the performance of it rests upon option and there is no sin on the non-performance but religious merit (punya) on the performance thereof as pilgrimage to Benares and the like."

Reference was also made to the dictum of their Lordships in the case of *The Collector of Masulipatam v. Cavalry Venkata Narrainappa* (1) where the Board pointed out the difference between alienations made by a widow for secular purposes and those made with religious motives. The Master of the Rolls who delivered the judgment in that case says as follows :—

"It is admitted on all hands, that if there be collateral heirs of the husband the widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity."

In *Raj Lukhee Dabee v. Gokool Chunder Chowdhry* (2), the Board gave expression to the same opinion. In *Rama and others v. Ranga* (3), the Madras High Court laid down that alienation by

(1) (1861) 8 M. L. A. 520 ; 2 W. R. P. C. 61.

(2) (1869) 13 M. L. A. 209 ; 3 B. L. R. P. C. 57 ; 12 W. R. P. C. 47.

(3) (1885) 1 L. R. 8 Mad. 552.

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a Hindu widow for religious purposes must be confined to ceremonies indispensable for spiritual benefit such as funeral obsequies and the periodical ceremonies incidental to those obsequies. But the learned Judges went on to add :—

“ We cannot recognise a sale by a Hindu widow as valid against her husband's reversioner, when it is made in view to raise money for doing pious acts which are not in the nature of spiritual necessities, unless such sale is reasonable in the circumstances of the family, and the property alienated is but a small portion of the property inherited from her husband.”

The case of *Ram Kawal Singh and others v. Ram Kishore Das and another* (1) has no analogy to the present. There the alienation was not for the maintenance of an idol which had been established by the husband of the widow, and the dedication was *prima facie* for the widow's own spiritual welfare and not for the husband.

There can be no doubt upon a review of the Hindu law, taken in conjunction with the decided cases, that the Hindu system recognises two sets of religious acts. One is in connection with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. In the later cases this distinction runs clearly through the views of the learned Judges. The confusion which has arisen in this case arises from mixing up the indispensable or obligatory duty with a pious purpose which although optional, is spiritually beneficial to the deceased.

With reference to the first class of acts, the powers of the Hindu female who holds the property are wider than in respect of the acts which are simply pious and if performed are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case she can alienate a small portion of the property for the pious or charitable purpose she may have in view. In the present case the High Court has found that the lands alienated form a small fraction of the whole estate. Had the Rani made the alienation for the purpose of defraying the expenses of the pilgrimage itself while she possessed ample means for the performance of the journey

(1) (1895) I. L. R. 22 Calc. 506.

and other acts connected therewith, there might have been some substance in the objection that she was not entitled to alienate any part of the immovable property having ample means at her disposal. But the alienation she has purported to effect was for the perpetual performance of act recognised in the Hindu system as pious. It was a dedication of a very small fraction of the property. The law with reference to this part of the case appears to their Lordships to have been set out with considerable clearness in a recent judgment of the Madras High Court† where the learned Judges, after an examination of the authorities on the point, say as follows :—

“We think we are warranted in holding that if the property sold or gifted bears a small proportion (which it is impossible to define more exactly) to the estate inherited and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioner. We are obliged to express ourselves somewhat guardedly because almost every gift according to Hindu notions is as such calculated to promote spiritual merit and the occasions for the performances of ceremonies calculated to bring spiritual reward are so innumerable that almost any expenditure not for a sinful object and any alienation by way of gift may be attempted to be justified as ministering to spiritual benefit.”

In the case of *Khub Lal Singh v. Ajodhya Misser* (1), a widow had raised money upon immovable property for the purpose of excavating a tank in connection with a temple founded by her husband, and a suit was brought by a reversioner to set aside the alienation. Mr. Justice Mookerjee referred to the words of Lord Gifford in the case of *Cossinauth Bysack and another v. Hurroson-dery Dossee and another* (2), that it was absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes,

“because it must depend upon the circumstances of the disposition whenever such disposition shall be made, and must be consistent with the law regulating such disposition ;”
and held that the alienation for the purpose of excavating the tank could not be impeached by the reversioner.

† *Vuppuluri Tatayya alias Veeranna v. Garimilla Ramakrishnamma and Others*, (1910) I. L. R. 34 Mad. 288.

(1) (1915) I. L. R. 41 Calc. 575 ; 22 C. L. J. 345.

(2) (1829) 2 Merley's Digest 198 ; Clarke 91 (100).

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In the present case the purpose for which the alienation was made was undoubtedly not for the performance of obsequial rites, or any such duty as might be regarded as obligatory under the Hindu law. But at the same time there can be no question that it was a pious act in the Hindu system. The estimation in which the deity installed in the Temple of Jagannath is held throughout the Hindu world is set out in Hunter's *Gazetteer*, Vol. II, under the title "Puri Town," where it is said as follows :—

"The true source of Jagannatha's undying hold upon the Hindu race consists in the fact that he is the god of the people. The poor outcast learns that there is a city on the far eastern shore, in which priest and peasant are equal in the presence of the 'Lord of the World.' In the courts of Jagannath and outside the Lion Gate, 100,000 pilgrims every year join in the sacrament of eating the holy food, the sanctity of which overleaps all barriers of caste, race and hostile faiths. A puri priest will receive food from a Christian's hand. The worship of Jagannath, too aims at a Catholicism which embraces every form of Indian belief and every Indian conception of the deity. He is Vishnu, under whatever form and by whatever title men call upon his name. The fetishism of the aboriginal races, the mild flower-worship of the Vedas, and the lofty spiritualities of the great Indian reformers have alike found refuge here. Besides, thus representing Vishnu in all his manifestations, the priests have super-added the worship of the other members of the Hindu Trinity in their various shapes ; and the disciple of every Hindu sect can find his beloved rites, and some form of his chosen deity, within the sacred precincts."

In their Lordship's opinion the Hindu law recognises the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner. It is clear in this case that the act which the Rani did was fully in accordance with Hindu religious sentiment and religious belief, and was not, therefore, in excess of her powers, having regard to the fact that the dedication related to one-seventy-fifth of the property made specially for the creation of a permanent benefit. The dedicated property has now passed into other hands. What the legal position of the defendants, who are assignees from the original grantees, may be with reference to the obligations created by the deed of gift is a matter that does not arise in the present case, and on that their Lordships do not express any opinion.

On the whole their Lordships are of opinion that there is no substance in the present appeal and that it should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Hy. S. L. Polak : Solicitor for the Appellants.

T. L. Wilson & Co. : Solicitors for the Respondents.

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Appeal dismissed.

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CIVIL RULE.

*Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice, and
Sir Ernest Edward Fletcher, Knight, Judge.*

IN RE MUKUNDA LAL DHAR*

Pleader—Certificate, renewal of—Government service, discharge from—Petition to contain full and complete disclosure—Suspension of practice, temporary.

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1920.

June, 7.

The petitioner was enrolled as a pleader on the 19th July, 1907 and his certificate was renewed in the year following. He subsequently obtained an appointment in the Police service. On his application, High Court permitted him to resume practice after relinquishing that employment. On the 9th January, 1920, the petitioner was discharged from Police service in connection with a criminal case instituted by the petitioner which resulted in a conviction of the accused. As there was a divergence between the story outlined by him in the first information and his statement on oath in Court, he was removed from the service. On the 17th February, 1920, he forwarded an application to High Court through the District Judge for renewal of his certificate. In this petition he stated that he was no longer in Government service but did not state the facts which led to his removal from Government service :

Held, that it was incumbent on him to make a full and complete disclosure in his petition: *In re Abiruddin* (1).

That his conduct was not such as would justify the refusal of the present application.

That as his conduct was not calculated to inspire absolute confidence, his certificate was not renewed at once but was ordered to be renewed with effect from 1st January, 1921.

Application for renewal of certificate.

*Order No. 732 of 1920 in Application to High Court.

(1) (1910) 1 L. R. 38 Cal. 309 ; 12 C. L. J. 625 ; 15 C. W. N. 357.

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Babus Mahendra Nath Ray and Suresh Chandra Talukdar
for the Petitioner.

Babu Dwarka Nath Chuckerbutty for Government.

The following judgment was delivered by

Mookerjee, A. C. J. :—This is an application by one Mukunda Lal Dhar for renewal of his certificate as a pleader. He was enrolled as a pleader on the 19th July 1907 and his certificate was renewed in the year following. He subsequently obtained an appointment in the Police service under the Eastern Bengal and Assam Administration and on his own application the following order was made by this Court on the 25th January 1909 "The High Court is pleased, under rule 32 of the Rules relating to Legal Practitioners, to suspend him from practising as a pleader for the period during which he may be employed under Government. It will be open to him to apply for permission to resume practice when he relinquishes that employment. Renewal of certificates during the period of suspension is not necessary." On the 9th January, 1920, the petitioner was discharged from Police service. On the 17th February, 1920, he forwarded an application to this Court through the District Judge of Dacca for renewal of his certificate, so that he might resume practice. In this petition, he stated that he was no longer in Government service. The District Judge thereupon directed him to produce a copy of the final order of discharge from Government service. He produced a copy which stated that he had been discharged as alleged. Thereupon the District Judge recorded the following note on the petitioner "Order produced : The application may be forwarded to the High Court, as I see no reason why it should not be allowed."

When the application was received in this Court, an enquiry was made as to the circumstances which had led to the discharge of the petitioner from the service of Government. It then transpired that the petitioner had been removed from the service of Government because of the part he played in a criminal case. It is not necessary for our present purpose to deal in detail with the circumstances of that case ; it is sufficient to state that the petitioner who had been assaulted and stabbed in the house of a woman was the complainant. On investigation by the Magistrate it was found that the allegation of assault was well-founded but that the circumstances under which the event had happened were not as narrated by complainant in the witness box. There was consequently a conviction of the accused in that case though not exactly on the basis of

the story told by the petitioner. The Sessions Judge took the same view of the matter. The Inspector General of Police, thereupon, held an enquiry into the conduct of the petitioner, and came to the conclusion that it was not desirable that he should continue to hold the responsible position of an Inspector. But in view of the fact that he had done good work during his term of service, the Inspector General thought that it was not necessary to dismiss him and that it would be sufficient to dispense with his services. When these facts were discovered on enquiry, this Court, in its administrative department thought it best to inform the petitioner that the matter must be determined judicially.

Thereupon, the present application was made and although the details of the circumstances which had resulted in his removal from the service were not stated in the petition, it was indicated that he had been removed in connection with the criminal case in question. As regards his conduct in relation to the criminal case we are of opinion that though open to serious comment, it has not been proved to be such as would justify the refusal of the present application. The substance of the matter was that there was a divergence between the story outlined by him in the first information and his statement on oath in Court. He has, however, not been prosecuted for perjury, and we cannot say with certainty that his conduct has been such that he should not be allowed to resume his practice.

A different question, however, requires consideration. It is plain that in his first application to this Court for renewal of his certificate he did not state the facts which had led to his removal from Government service. We are of opinion that this was not the proper way to treat this Court and that it was incumbent on him to make a full and complete disclosure as was laid down in the case of *In re Abiruddin* (1). If he apprehended that full disclosure might lead to the refusal of his application, his conduct is clearly reprehensible. On the other hand, if he thought that the Court need not know all his antecedents, his judgment was manifestly wrong. In either view, his conduct is not calculated to inspire absolute confidence. We have anxiously considered the matter in all its aspects and we have come to the conclusion that although we need not exclude him from practising his profession for all time, the certificate should not be renewed at once. We direct that the certificate be renewed with effect from the 1st January 1921.

A. T. M.

Application granted.

(4) (1910) 1, L. R. 38 Calc. 309; 12 C. L. J. 625; 15 C. W. N. 357.

CIVIL.

1920.

In re Mukunda Lal.

Mookerjee, A. C. J.

Before Mr. Justice Rankin, and Mr. Justice B. B. Ghose.

NANIBALA DASSYA

v.

JAMINI SUNDARI AND OTHERS.*

CIVIL.

1922.

January, 25.

Pauper—Minor, a pauper—Next friend, not a pauper—Civil Procedure Code (Act V of 1908), O. 33—English law.

A minor who is not possessed of sufficient means within the definition of pauperism for the purpose of order 33 of the Code of Civil Procedure, can sue in *forma pauperis* by a next friend although the latter is not a pauper: *Venkatanarasayya v. Achemma* (1) followed. The wealth or other circumstances of the minor's relation in general are not material under the Code. The law of India in this respect is different from that prevailed in the Court of Chancery in England.

Application for Revision under section 115 of the Code of Civil Procedure.

Babu Rajendra Chandra Guha for the Petitioner.

Babu Surendra Nath Guha for the Opposite Party.

The judgments of the Court were as follows :

Rankin, J: In this case I am of opinion that the rule must be made absolute. It appears that upon the terms of the Civil Procedure Code and the cases thereunder, in particular the case of *Venkatanarasayya v. Achemma* (1), a minor who is not possessed of sufficient means within the definition of pauperism for the purpose of Order 33 is entitled to be allowed to sue in *forma pauperis* by a next friend although the next friend is not a pauper. In like manner the wealth or other circumstances of the minor's relation in general are not material under the Code. The law of India in this respect appears to be very different indeed from the law as prevailed in the Court of Chancery in England. Under the circumstances we have no option but to make this rule absolute and to direct the Court below to proceed under Order 33. There will be no order as to costs.

B. B. Ghose, J: I agree.

A. T. M.

Rule made absolute.

* Civil Rule No. 575 of 1922, against the decision of Babu W. C. Ghosh, Munsif of Manikgunj, dated the 19th June, 1922.

(1) (1881) 1 L. R. 3 Mad. 3.

APPELLATE CIVIL.

Before Mr. Justice C. C. Ghose, and Mr. Justice Panton.

NAWAB KHAJEH HABIBULLA AND OTHERS

v.

GOLA ASMOTER KHATUN AND OTHERS.*

CIVIL.

1923.

January, 15.

Revision—Appeal petition treated as revision—Civil Procedure Code (Act V of 1908), Sec. 115—Justice—Decree, amendment of—Condition not fulfilled—Application for extension of time—Preliminary decree.

In the Court of first appeal the following order was passed: "The suit be decreed in part, the title of plaintiffs Nos. 2 to 7 be declared to 1 kani of plot No 2 of the plaint and the plaintiffs 2 to 7 do remain in possession of the same. The parties [except plaintiff No. (1)] do get costs in the lower Court in proportion to their success. But all this is dependent upon the plaintiffs Nos. 2 to 7, paying within one month from to-day, a further Court-fee of Rs. 65. Plaintiffs' appeal No. 34 is dismissed with costs, on condition that plaintiffs 2 to 7 do pay within one month from to-day a further Court fee of Rs. 65, in default of which appeal No. 34 will be allowed in full, that is the original suit will be dismissed with costs in both Courts to defendants." This order was made by A on the 20th February, 1918. On the 26th February the decree was signed by A. Plaintiffs Nos. 2 to 7 did not carry out the order of the Court within the time limited. On the 5th July 1920, an application was made on behalf of the plaintiffs Nos. 2 to 7 for permission to deposit in Court a further Court-fees of Rs. 65 as mentioned in the judgment dated the 20th February, 1918 and in the decree dated the 26th February, 1918. The matter came before B, another Judge. The further Court-fee was actually deposited in Court by the plaintiffs Nos. 2 to 7 on the 30th July, 1920, and thereupon B ordered that the decree (described as the final decree) should not be passed in this case. In accordance with this order a clause was inserted in the original decree which ran as follows: "In accordance with order No. 14 of the order sheet dated the 20th July, 1918 Court-fee of Rs. 65 having been paid, the decree is made final." Against this decree, the defendants appealed:

Held, that if there be no appeal against the decree, the appeal, under the circumstances of the case could be treated as a petition under section 115 of the Code of Civil Procedure; the circumstances being so extraordinary, that it would amount to a denial of justice if no relief be given to the defendants.

That the Court below exercised a jurisdiction in amending the decree.

That the decree which was drawn up on the 26th February, 1918, was itself a final decree, and the fact that it was drawn up before the expiration of one month from the 20th February, 1918, could not make it a preliminary decree.

Appeal by the Defendants.

Suit for recovery of possession of lands after establishment of title thereto.

*Appeal from Appellate Decree No. 2674 of 1920, against the decree of C. Sells Esq., Additional District Judge of Tipperah, dated the 20th February, 1918, modifying that of Babu Kunja Behari Ghose, Munsif, 3rd Court, at Comilla, dated the 30th November, 1916.

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Nawab Khajeh
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v.
Gola Asmoter
Khatun.

January, 15.

The material facts appear from the judgment.*

Babus Surendra Nath Guha and *Sisir Kumar Ghosal* for the Appellants.

Mr. A. K. Fuzlal Huq, and *Babu Radhika Ranjan Guha* for the Respondents.

The judgment of the Court was delivered by

C. C. Ghose J.—This appeal has arisen under rather peculiar circumstances. The suit out of which this appeal has arisen was brought by the plaintiffs for recovery of possession of two plots of land after establishment of title thereto. In the Court of First Instance the suit was decreed in the following manner. The plaintiffs' title was declared to one kani of plot No. 1 and the entirety of plot No. 2 as against defendants Nos. 1 to 19 and 23 to 26 after contest and *ex parte* as against the remaining defendants. In the Court of appeal below, the following order was passed. "The suit be decreed in part; the title of plaintiffs Nos. 2 to 7 be declared to 1 kani of plot No. 1 and plot No. 2 of the plaint; and plaintiffs 2 to 7 do remain in possession of the same. So far as plaintiff No. 1 is concerned, the suit is dismissed with costs. The parties (except plaintiff No. 1) do get costs in the Lower Court in proportion to their success. But all this is dependent upon plaintiffs Nos. 2 to 7, paying within one month from to-day, a further Court-fee of Rs. 65. Appeal No. 79 is, therefore dismissed, with costs. Appeal No. 34 is partially allowed with proportionate costs; as against other respondent, plaintiffs' appeal No. 34 is dismissed with costs, on condition that plaintiffs 2 to 7 do pay within one month from to-day, a further Court-fee of Rs. 65; in default of which appeal No. 34 will be allowed in full, *i. e.* the original suit will be dismissed with costs in both Courts to defendants." This order was made by Mr. C. Sells, additional District Judge of Tipperah on the 20th February 1918. On the 26th February, the decree, which was the formal expression of opinion on the part of the Court of appeal below, was signed by Mr. Sells. This decree is in accordance with the ordering portion of the judgment which has been set out above. It appears that the plaintiff Nos 2 to 7 did not carry out the order of the Court by which they were directed to pay a further Court-fee of Rs. 65 within the time limited by the order and by the decree which was signed on the 26th February 1918. On the 5th July 1920 an application was made on behalf of the plaintiffs Nos. 2 to 7 for permission to deposit in Court a further Court-fees of Rs. 65 as mentioned in the judgment which was delivered on

the 20th February 1918 and in the decree which was signed on the 26th February 1918. Mr. Sells had been transferred from Tipperah and the matter came on before Mr. Martin who was acting as an additional District Judge. The further Court-fee was actually deposited in Court by the plaintiffs Nos. 2 to 7 on the 30th July 1920 and thereupon, Mr. Martin ordered that the decree (described as the final decree) should now be passed in this case. In accordance with Mr. Martin's order dated the 30th July 1920 a clause was inserted in the original decree which ran as follows. "In accordance with order No. 14 of the ordersheet dated the 20th July 1918, Court-fee of Rs. 65 having been paid, the decree is made final. The appeal, that is being dismissed with costs, is against the other respondents (sic) and the plaintiffs Nos. 2 to 7 will get Rs. 65 as costs in addition to that already awarded to them." (vide the judgment dated the 20th February 1918). Defendants Nos. 1 to 26 complain that inasmuch as plaintiffs Nos. 2 to 7 did not carry out the order made by Mr. Sells on the 20th February 1918, as regards paying into Court a further Court-fee of Rs. 65 which was ordered by him to be paid into Court within one month from the 20th February 1918, the decree by Mr. Sells could not be reopened again and extension of time granted after the expiration of more than 2 years from the date of the original order on the plaintiffs Nos. 2 to 7 to pay into Court a further Court-fee as referred to above. It is argued on behalf of defendants Nos. 1 to 26 that notwithstanding the terms of section 148 of the Code of Civil Procedure the application of plaintiffs Nos. 2 to 7 made on the 5th July 1920 was incompetent and that the Court below had no jurisdiction whatsoever to amend in July 1920 the decree by Mr. Sells and to enlarge the time granted by the decree of Mr. Sells to pay into Court the further Court-fee of Rs. 65. In support of this contention our attention has been drawn to a number of cases amongst which may be mentioned the cases : *Saranjan v. Ram Behal* (1), *Sajjadi v. Dilwar* (2), *Dharmaraja v. Srinivasa* (3). Mr. Huq on behalf of the respondents has vigorously contested the appellants' right of appeal to this Court and has argued, firstly, that there was no right of appeal from the order of Mr. Martin, which was merely an order for amendment of the previous decree. Secondly, that even if the appeal preferred by defendants Nos. 1 to

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(1) (1913) I. L. R. 35 All. 582 ; 11 A. L. J. 950.

(2) (1918) I. L. R. 40 All. 579 ; 16 A. L. J. 625.

(3) (1916) I. L. R. 39 Mad. 876 ; 31 I. C. 240 ; 29 M. L. J. 708 ; 18 M. L. T. 486.

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26 be treated by this Court as a petition by way of revision under section 115 of the Code of Civil Procedure the appellants cannot get any relief whatsoever, for the order complained of, was made by the Lower appellate Court in the exercise of its discretion and it is not usual for this Court to interfere with orders made by the Courts below in the exercise of their discretion. Thirdly, that the decree signed by Mr. Sells on the 26th February 1918 was merely a preliminary decree which had to be made final by a further decree and that no such decree having been made by the Courts below for a period of more than two years from the 26th February 1918 or at any rate, before the 5th July 1920, it was open to the plaintiffs Nos. 2 to 7 to apply to the Court to put in a further Court-fees as mentioned in the original order of the 20th February 1918 and to make such application at any time before the final decree was passed. We are of opinion, for the reasons about to be given, that there is no substance, whatever in any of the contentions urged before us on behalf of the respondents but that the contentions urged on behalf of defendants Nos. 1 to 26 should prevail. In the first place, it is quite unnecessary for us to go into the question as to whether the appellants had a right of appeal to this Court. Assuming however that they had not, the circumstances of this case demand of us that we should treat the appeal preferred by the defendants No. 1 to 26 as a petition under section 115 of the Code of Civil Procedure. The circumstances are so extraordinary that it would amount to a denial of justice if we were to hold that our powers are so limited that we cannot give any relief to defendants Nos. 1 to 26 in the circumstances which have happened. In the second place, we are of opinion that the decree which was drawn up shortly after the 20th February 1918, namely, on the 26th February 1918 was in itself a final decree. No doubt, it would have been better if the Court after determining that the extra fee was payable had ordered the fee to be paid within a certain time and had delayed passing the decree until the time limited by the order had expired. But the fact that the decree was drawn before the expiration of one month from the 20th February 1918 did not in any way amount to this that it was to be treated as a preliminary decree and that it was to be followed by a further formal expression of opinion of the Court namely, by a further final decree. The default provisions mentioned in the judgment itself of the 20th February, 1918, are incorporated in the decree which was signed on the 26th February 1918 and it was a self contained decree in every sense of the word and it was to all intents and purposes the final formal expression of opinion of]

the Court. That being so, it now remains for us to consider as to whether the appellants before us have brought their case within the four corners of section 115. As we have already held, the decree signed on the 26th February 1918 was a final decree. If it was a final decree, then subject to such rights of amendment, as for instance, the rectification of a clerical error and so forth, that decree could not be amended by the Court which passed the decree. That being so, there was clearly an exercise of jurisdiction by the Court below which had not been vested in it. In the circumstances, there is therefore no other alternative but to set aside the order made by Mr. Martin on the 2nd August 1920 and we accordingly do so.

The result, therefore, is that the decree as drawn up and signed by Mr. Sells on the 26th February 1918 must stand and all necessary results must follow therefrom.

The appellants have succeeded and they are, therefore, entitled to their costs. We assess the hearing fee at two gold mohurs.

A. T. M.

Appeal allowed.

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CIVIL RULE.

Before Mr. Justice Rankin.

RAKHAL CHANDRA CHATTERJEE

v.

ROHINI KUMAR CHATTERJEE.*

CIVIL.

1923.

January, 3.

Jurisdiction—Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II. Cl. 35 Sub-cl. (ii)—Damages—Cause of action—Interest.

In the plaint it was alleged that the defendant in collusion with the railway officers took Coal and misappropriated it or converted it to his own use. It was also stated that the plaintiff went to the defendant, that they discussed the matter, that the defendant executed the *chit* promising to pay, not damages at the market value, but a particular sum made up in a particular way. There was a reference in the plaint to the place at which the cause of action arose and reference was made to the fact that within the jurisdiction of the Court the *chit* was executed and the goods were delivered :

Held, that the suit was maintainable in the Small Cause Court, as the claim was for a particular sum of money shown by the *chit* and not for damages either for conversion or for compensation for theft.

* Civil Rule No. 696 of 1922 against the decree of Babu N. C. Ghosh, Additional Subordinate Judge of Barisal, dated the 8th July, 1922.

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In the absence of evidence of custom, the small Cause Court Judge had jurisdiction to grant interest at the high rate of 24 percent per mensem.

Application for Revision under section 25 of the Provincial Small Cause Court Act by the Defendant.

The material facts appear from the judgment.

Babu Brojo Lal Chakravarty and *Radhika Ranjan Guha* for the Petitioner.

Babu Sailendra Nath Mukherjee for the Opposite Party.

The judgment of the Court was delivered by

January, 3.

Rankin J: This rule was issued on two grounds, the first being that the Court below had no jurisdiction and the second being that the judgment was erroneous in law as the learned Judge had failed to decide various questions raised in the pleadings: The learned pleader for the petitioner has put his case thus: that in the plaint there are really to be found two causes of action—one being an action for damages for the wrongful misappropriation of certain coal belonging to the plaintiff—that wrongful misappropriation resulting in a criminal offence and therefore coming within clause 35 sub-clause (ii) of the second schedule to the Provincial Small Cause Courts Act; & the second being a claim upon a contract evidenced by a document called a *chit* said to have been executed by the defendant to pay a certain price for the coal in question. The complaint made is that although the suit considered as a claim upon a *chit* was within the competence of the Small Cause Court, the learned Judge while purporting to give judgment upon that cause of action has allowed himself to be influenced by the other aspect of the case and has in particular dealt with the question of interest upon a view which shows that he had not only in his mind the cause of action on the *chit* but the other cause of action which is not proper to a Small Cause Court.

Now I have not the advantage of being able to render the vernacular of the plaint in this case but I have had the paragraphs explained to me and in my opinion the plaint properly read is a plaint upon the *chit* and is not a suit for damages either for theft of coal or for the conversion of the coal in any sense. It is quite true that in the third paragraph of the plaint it is alleged that the defendant in collusion with the railway officers took the coal and misappropriated it or converted it to his own use. I will assume that the meaning of that is exactly the same as if the plaint had stated that the defendant had stolen the property. Nevertheless when one reads the plaint fairly one sees that that paragraph is

followed by a statement of subsequent facts, namely, that the plaintiff went to the defendant, that they discussed the matter, that the defendant executed the *chit* promising to pay, not damages at the market value, but a particular sum made up in a particular way. There is nothing in the plaint to show that the transaction is represented as two alternative causes of action. At the end of the plaint, it is true that, there is a reference to the place at which the cause of action arose and reference is made to the fact that within the jurisdiction of the Court the *chit* was executed and the goods were delivered. It has been suggested to me that that reference to the place where the goods were delivered shows that the plaintiff was harking back to a claim for damages for the conversion of the coal. I do not think so. Reference to the place of delivery would be one of the circumstances which would tend to show that the suit was properly brought if brought only and solely on the *chit*. In my view the plaint was intended to be, when carefully looked, a claim for a particular sum of money shown by the *chit* and not a claim for damages either for conversion or for compensation for theft. That being so, neither of the ways in which the petitioner put his case when applying for the Rule, nor the very much better way in which his case was put before me by the learned pleader can stand. I think there is no objection in law to the case being tried in a Small Cause Court.

The matter really ends there as there is no substance at all in the second ground mentioned in the petition. But the learned Judge in dealing with the question of interest uses the following language: As regards interest, "I think it proper under the circumstances of this case, as the defendant's conduct was most heinous from the very beginning, to grant it. The rate is not high." I think what the learned Judge meant was this: First of all, I do not think he was referring merely to the circumstances under which the coal was originally taken. He was referring to the fact that in his view the defendant had signed the *chit* and afterwards repudiated it. I think, moreover, the remark is to explain why he thinks it a proper case to grant interest at all.

As regards the rule of interest, what he says is that the rate is not high and he allowed the rate claimed; that is two percent per mensem. Now there is something to be said as a matter of discretion under the Civil Procedure Code against allowing a rate of interest as high as 24 per cent per annum except in the presence of a contract to that effect or some evidence that that was the usual rate in the particular market concerned. There was no such allegation

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in the plaint and though it has been stated that it is the usual rate, the only finding of the learned Judge is that the rate is not high. I should rather have thought a rate of 24 per cent per annum a very high rate of interest but this matter is not in any way affected in my judgment by the fact that the learned Judge has entertained a kind of case which was not within his jurisdiction. I think he had full jurisdiction over all matters comprised in the plaint when the plaint is properly understood, although in the absence of evidence of custom, 24 per cent per annum is a high rate, I think he had jurisdiction to grant it. I therefore do not think it fit in this case to interfere.

The result is that the rule is discharged with costs.—One gold mohur.

A. T. M.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice Walmsley, and Mr. Justice Sukrawardy.

SARADINDU CHAKRAVARTI

v.

GOSTA BEHARI PRAMANICK AND OTHERS.*

Benamidar, suit by—Purchase by decree-holder without permission of Court—Civil Procedure Code (Act V of 1908), Sec. 66, O, 21 R. 72—Defendant in possession.

By an agreement between the decree-holder auction-purchaser and the judgment-debtor the latter was put in possession till a fixed time, when the decretal amount will be paid, and if not paid within that time, the purchaser will get khas possession. The amount not being paid, the plaintiff claimed khas possession :

Held, that the suit was not barred under section 66 of the Code of Civil Procedure, as the certified purchaser and his successor did not at any stage claim title under the sale certificate.

Per Walmsley, J. : That the effect of the purchase by the decree holder without the permission of the Court was voidable and not void.

Per Sukrawardy J. : That defendant being in possession of the property in suit, could urge by way of defence that the plaintiff's purchase without permission of the Court was not enforceable as against him even if it were voidable at the option of the defendant only. But it depended greatly on the discretion of the Court, and in exercising such discretion the Court would take into account prejudice to the defendant e. g. inadequacy of price etc.

Section 66 of the Civil Procedure Code applies when the plaintiff attempts to enforce his secret title as against the certified purchaser.

Appeal by Defendant No. 4.

Suit for possession of land, with mesne profits, and, in the alternative, for payment of the unpaid balance.

The material facts appear from the judgment of Walmsley J.

Babu Samatul Chandra Dutt for the Appellant.

Babu Debendra Narain Bhattacharjee for the Respondents.

C. A. V.

The following judgments were delivered :

Walmsley J.—This appeal is preferred by defendant No. 4. The plaintiff's case is that the predecessors of defendants 1—3 executed a mortgage in his favour in 1310 B. S ; he then brought

* Appeal from Appellate Decree No. 855 of 1920, against the decree of B. N. Rau Esq. District Judge of Murshidabad, dated the 22nd December, 1919, affirming that of Babu Kamini Kumar Mukherjee, Subordinate Judge of Murshidabad dated the 30th September, 1918,

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a suit on the mortgage against the representatives of the mortgagors, and against the defendant 4 as a purchaser, in 1898 and in execution of his decree caused the property to be sold in 1909, when it was bought by Parameswar Ghose, father of defendants 5, 7 and servant of the plaintiff, as benamidar for the plaintiff. It is beyond doubt that there was such a mortgage, that the plaintiff obtained a decree and that the property was bought by Parameswar.

The plaintiff went on to say that the father of defendants 1—3 then entered into an agreement with the plaintiff, by which the defendants were to pay off the plaintiff's dues by the end of 1322 B. S., meanwhile remaining in possession, and in default the plaintiff was to take khas possession after the end of 1322 B. S. The defendants 1—3 and defendant 4 did as a matter of fact remain in possession and according to the plaintiff it was by virtue of this arrangement. The plaintiff further alleged that only part of the total sum was paid, so he claimed khas possession of the land, with mesne profits, or, in the alternative, a decree for the unpaid balance.

The first Court gave the plaintiff a decree for khas possession, and also for mesne profits.

The defendant No. 4 preferred an appeal which was unsuccessful, and in consequence he has preferred this second appeal.

Two points are raised on his behalf. The first is that the suit is barred by section 66 of the Civil Procedure Code. Both the Lower Courts rejected this argument and I think rightly, for the reason that Parameswar and his successors have not at any stage claimed title under the sale certificate.

The second argument is based on the provisions of Order XXI, rule 72. The plaintiff as decreeholder did not obtain the Court's permission to bid at the sale instead of seeking permission, he caused his servant to buy the mortgaged property benami. The effect of this purchase without permission was considered by both the Courts below, and they took the view that the purchase was voidable but not void, and that defendant No. 4 could no longer avail himself of the remedy provided by clause (3) of the rule.

In the grounds of appeal to this Court, the third and fourth, deal with this matter, and we are asked now to hold that the Lower Courts should have treated the written statement as an application to set aside the sale. If we were to accept that argument, we should have to remand the case, for there are at least two points which would require investigation, namely, whether the defendant could

show that his application was not barred by limitation, and whether in the circumstances the case was one in which the Court should exercise its discretionary power of setting aside the sale under clause (3). I mention these two points merely to show the force of the respondent's answer that the defendant is setting up an entirely new case. I think that answer is correct, and that on that account the appellant's contention must be overruled. The result is that the appeal must be dismissed with costs.

Suhrawardy, J.—I am of the same opinion. I think the defendant being in possession of the property in suit would be entitled to urge by way of defence that the plaintiff's purchase without permission of the Court was not enforceable as against him even if it were voidable at the option of the defendant only. But it depends greatly on the discretion of the Court, and in exercising such discretion, according to authorities, the Court will take into account prejudice to the defendant, e. g., inadequacy of price etc. So it is not the absolute right of the defendant to ask the Court to set aside such a sale, which I take, is affected with a mere irregularity. In this case the defendant treated the sale as absolutely void and did not ask the Court to exercise its discretion in the matter or place materials before it for the right exercise of such discretion. Even if I were asked to exercise such discretion in this case, I would, in the absence of any material, decide in favour of the plaintiff. I agree that at this stage of the litigation the defendant should not be allowed to make a new case.

As to section 66 Code of Civil Procedure the heirs of Parameswar do not appear in this case and deny plaintiff's benami purchase. That section only applies when the plaintiff attempts to enforce his secret title *as against* the certificated purchaser. This contention therefore fails.

A. T. M.

Appeal dismissed.

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Walsley, J.

Before Mr. Justice Rankin, and Mr. Justice Panton.

PRAMATHA NATH SEN GUPTA

v.

SHEIKH ABDUL AZIZ MEAH.*

Civil.

1923.

January, 19.

Suit, if maintainable—Bond taken by a commissioner in partition suit for work done, from a party—Commissioner, duty of.

A commissioner appointed by a Court must keep himself clear of any ambiguous conduct towards any party in the matter of his fees.

The work done by the commissioner for partition is the work done for that Court.

At a time when the commissioner was assisting the arbitrator appointed by parties in a partition suit, to discharge judicial duties as between one party to a partition suit and another, he was approaching the plaintiff from time to time and getting sums of money on account, and finally as a condition of submitting his report, he took from the plaintiff a mortgage bond for a fixed sum of money, which the plaintiff thereby promised to pay:

Held, that a suit on the bond was not maintainable.

That it was contrary to the duty of a commissioner; that it was improper and illegal conduct.

That the Commissioner, if sufficient fees were not forthcoming, was entitled to go to the arbitrator, who was empowered by Court to appoint him, and to object to do the work without remuneration.

Appeal by the Plaintiff.

Suit on a mortgage bond.

The material facts appear from the judgment of Rankin J.

Babus Gunada Charan Sen and Jitendra Kumar Sen Gupta for the Appellant.

Babus Krishna Kamal Maitra (for Babu Jotindra Mohan Chowdhuri) and *Subodh Chandra Roy Chowdhury* for the Respondent.

The judgments of the Court were as follows:

Rankin, J: This is a second appeal brought by the plaintiff who acted as a Commissioner in a partition suit which was referred to arbitration under the second schedule of the Code. It appears that an arbitrator having been appointed certain petitions were made to the arbitrator including one by the plaintiff in the suit asking that in respect of a certain property there should be a local enquiry. On

* Appeal from Appellate Decree No. 2556 of 1920, against the decree of Mouli Abdul Khaleque, Officiating Subordinate Judge of Noakhali, dated the 12th July, 1920, reversing that of Babu Dwijendra Nath Pal, Munsif 3rd Court at Sudharam, dated the 2nd December, 1918.

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the 8th March, 1915 the Court having appointed the arbitrator to determine all the matters in difference between the parties in the suit empowered him to dispose of all the petitions filed before him including the plaintiff's petition for the appointment of a pleader commissioner. The order gave the arbitrator power to appoint "whomsoever he likes" and directed the plaintiff to deposit Rs. 100 at present as Commissioner's fees etc. within seven days. The plaintiff deposited Rs. 100 in terms of that order and the plaintiff in the present suit was appointed Commissioner under that order. His actual appointment was made by the arbitrator under the power given to him by that order of the Court. The present defendant who was then plaintiff was applied to from time to time by the Commissioner to put in certain additional sums as further fees and in the end the Commissioner got ready his report and approached the plaintiff in the suit on the footing that unless a couple of hundred rupees more were paid he could not be expected to file his report. Thereupon a mortgage bond was given to the Commissioner by the then plaintiff promising to pay Rs. 200. On that bond the Commissioner has now sued,

The first Court has decreed the suit and the Lower Appellate Court has dismissed the suit on the ground that the mortgage bond taken by the Commissioner in that way is taken contrary to law and cannot be sued upon. I shall, for the present purpose, put on one side altogether any question except this, whether the taking of that mortgage bond by the Commissioner was such a breach of his duty towards the parties, to the arbitrator and to the Court that it cannot be sued upon as being an illegal contract. In my opinion that proposition ought to be affirmed, and none the less so that it is good law that when one party at the instance of another has done work or come under an obligation, there may be an implied contract by the party at whose instance the work has been done to indemnify the other. The Commissioner if sufficient fees were not forthcoming, was quite entitled to go to the arbitrator and to object to do the work without remuneration. It was quite proper for the arbitrator, if he thought fit, to require the plaintiff to pay further sums of money into the arbitrator's hands. It was quite open to the arbitrator to enquire as to the amount due, to fix the terms of the commissioner's remuneration and to deal with the matter as justice should require. It appears that no actual rate was fixed by contract with any body. It is said that the rate usually allowed under the Rules of the High Court was taken as a guide in assessing what was due to the Commissioner. But the plaintiff was not in so good a position as

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the arbitrator to dictate to the Commissioner any terms, to tax his bills, to query entries in the diary or to see that he did his duty properly. It is quite true that in all probability, the arbitrator would feel obliged to make the plaintiff and no other party deposit the amount necessary to meet the Commissioner's claim. What happened was, that, at a time when the Commissioner was assisting the arbitrator to discharge judicial duties as between one party to a partition suit and another, he was approaching the plaintiff from time to time and getting sums of money on account, and finally as a condition of rendering his report, he took from the plaintiff this mortgage bond for a fixed sum of money, viz., Rs. 200 which the plaintiff thereby promised to pay. In my judgment this is entirely contrary to the duty of a Commissioner whether he be regarded as appointed by an arbitrator or whether he be regarded as appointed by the Court, the arbitrator having power to nominate the individual. It is quite incredible that the duties of a Commissioner should be thought consistent with approaching an individual party and getting him to pay sums of money in discharge of an untaxed bill of costs upon the footing that unless this is done the report will not be filed. In my judgment there is no doubt about the principle. The Commissioner's duty was to keep all parties at arms length, to receive no favour from any one, to look to one no more than to another. If he wanted his money he had the arbitrator as the person whose duty it was to put proper pressure on the right party and to provide for an adequate remuneration in a reasonable and proper way. For the Commissioner himself to put any sort of pressure upon one party so as to make the immediate payment of an untaxed bill a condition without which the Commissioner's duty would not be done, or would be done at another time is not merely ill-advised conduct. It is improper and illegal conduct. No such bargain so procured can stand. It is an improper advantage obtained by an officer of Court by abuse of his position as such officer. The case of *Gopalaratnamayyar v. Bhupala Narasimma Nayudu* (1), is a case with reference to a suit for fees by a Commissioner after the litigation in question has come to an end. That is another matter altogether. It is not the case that the Commissioner is the servant of the party at whose instance the Court or the arbitrator makes the appointment. The work done is not work done for that party. It is work done for the Court and the right to sue a party at whose instance the Court appoints a Commissioner is not the right to sue a party for whom the plaintiff has worked. It must be based

(1) (1882) 1 L. R. 4 Mad. 309.

upon a different principle of law: namely that where one party does work, or incurs an obligation at the instance of another there is in certain circumstances an implied provision of indemnity. It seems to me necessary that there should be no doubt cast on the broad rule that a Commissioner appointed by a Court must keep himself clear of any ambiguous conduct towards any party in the matter of his fees. I think the conclusions at which the learned Subordinate Judge has arrived are correct and that his decision should be upheld.

The appeal is accordingly dismissed with costs.

Panton J: I agree.

A T. M.

Appeal dismissed.

CRIMINAL REVISION.

Before Mr. Justice Newbould and Mr. Justice Suhrawardy.

PRASANNA CHANDRA MAJUMDAR

v.

UPENDRA NATH SHAW.*

*Conviction altering—Criminal Procedure Code (Act V of 1898), Sec. 423—
Order of acquittal.*

The Sessions Judge has no jurisdiction to set aside an order of acquittal of an offence under Sec. 379 I. P. C. which was passed by the trying Magistrate when he upholds a conviction and sentence under section 143 I. P. C. as it is not a case of altering the conviction.

Application for Revision under section 435 of the Code of Criminal Procedure.

The subject-matter of the present case was an old tank known as the Talpukur tank, in Mauza Dadra Bamboo, Jaypurhat. Both Surendra Mohan Mondal (Prosecution witness), a medical practitioner at Joypurhat and Prasanna (Accused No. 1) claimed to be in possession of this tank.

*Criminal Revision No. 1134 of 1922, against the order of M. H. Lethbridge Esq., Additional Sessions Judge of Pabna, dated the 18th September, 1922, modifying that of Babu S. K. Ganguli, Deputy Magistrate of Bogra, dated the 30th June, 1922.

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On the 20th February 1922, Prasanna with a large number of men went to the tank to catch fish there. Surendra's compounder and a constable of the Jaypurhat thana were already on the spot in anticipation of a breach of the peace. Under order of Prasanna, 7 or 8 men cut the ropes and removed the bamboo and canes with which Surendra's men were pumping water from the tank. After doing some mischief the accused went away.

Babu Bir Bhusan Dutt for the Petitioner.

No one for the Opposite Party.

The judgment of the Court was as follows :

February, 23.

The petitioner in this case was convicted by the Deputy Magistrate of Bogra under section 143 Indian Penal Code and sentenced to pay a fine of 100 Rupees. On appeal to the Sessions Judge of Pabna he upheld the conviction and sentence and further passed an order setting aside the order of acquittal of the offence under section 379 Indian Penal Code which had been passed by the trying Magistrate. The learned Sessions Judge had clearly no jurisdiction to set aside the acquittal of the petitioner when he upheld the conviction under section 143 Indian Penal Code. It was not a case of altering the conviction which was within his powers under section 423 Criminal Procedure Code. We accordingly make this rule absolute and set aside the order of the Sessions Judge so far as it sets aside the acquittal of the petitioner under section 379 Indian Penal Code by the trying Magistrate.

A. T. M.

Rule made absolute.

CRIMINAL REFERENCE

Before Mr. Justice Newbould, and Mr. Justice Sukrawardy.

SHEIKH SAMIR AND OTHERS.

v.

BENI MADHAB GOPE AND ANOTHER.*

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Trial, simultaneous—Cross cases—Trial by different Magistrates—Transfer—Stay of proceeding.

* Criminal Reference Nos. 150 and 150 A of 1922, made by P. C. De Esq. Sessions Judge of Dacca, dated the 28th October, 1922.

There was a dispute regarding some land between two parties. A of one party complained before the Magistrate and summons was at once issued against B and others of the other party under section 147 I. P. C. On the next day, B lodged a counter case which was sent to the police for report and on police report C. and D. of A's party were summoned under section 323 I. P. C. The two cases, were then made over to two different Magistrates for disposal. In A's case all the prosecution witnesses were examined and charge was framed against the accused under section 147 I. P. C. In the other case only one witness for the prosecution was examined :

Held, that both the cases should be tried by one Magistrate. That the trial of the case in which A was the complainant should be proceeded with and the proceedings in B's case should be stayed till the disposal of A's case.

Reference under section 438 of the Code of Criminal Procedure.

The material facts appear from the following

Order of Reference.

On 17th July last there was a dispute regarding some land between the two parties—the complainant and the accused party. Both parties alleged to be ryots but one party claims a prior right to the others. On that very day Judisthir Gope of one party complained before the Magistrate and the Magistrate at once issued summons against Samir and others of the other party under section 147 Indian Penal Code. Then on 18-7-22 Samir lodged a counter case which was sent to the Police for report and on 25-7-22 on police report Beni and Gayanath of Judisthir's party were summoned under section 323 Indian Penal Code. Then it appears the two cases were made over to two different Magistrates for disposal. Up to date in Judisthir's case all the prosecution witnesses 7 in number have been examined and charge has been framed against the accused under section 147 Indian Penal Code. In the other case up to date only one witness for the prosecution has been examined.

Both parties are agreed in fact both parties have filed application to the effect that the simultaneous trial of the two cases over one and the same occurrence is undesirable and unsatisfactory and each party has claimed that the trial of the other party's case should be deferred till the disposal of his case.

*The order recommended for revision:—*In my opinion the trial of Judisthir's case should be proceeded with and proceedings in Samir's case should be stayed till the disposal of Judisthir's case.

*Irregularity and illegality and grounds for revision:—*It being admitted by both parties that simultaneous trial of two

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cases by two different Magistrates is unsatisfactory and undesirable, I need not expatiate on the point. The ruling in *Bachu v. Sia Ram* (1) clearly and very fully points out the irregularity amounting to illegality, of such a course. Now the point is, which case should be proceeded with and which should wait. In this matter I have given preference to Judisthir's case for the following reasons :

1. Judisthir's complaint is prior to that of Samir's in time.

2. In Judisthir's case already the prosecution case is closed and charge has been framed whereas practically very little has been done in Samir's case.

No explanation has been submitted by the Lower Court.

Babu Ramgati Sarkar for the accused Samir and others.

The following judgment was delivered :

December, 8.

On the facts stated in the letter of reference we think it desirable that both the cases should be tried by one Magistrate and the learned Sessions Judge's suggestion as to the order of trial accepted. We accordingly transfer the case in which Sheik Samir is the complainant and Beni Madhab Gope and another accused from the file of Babu J. C. Mazumdar Deputy Magistrate of Manikgunge to the file of Babu J. Chakraverty Sub-Deputy Magistrate of Manikgunge, and we also direct that the trial of the case in which Judisthir Gope is the complainant and Samir Sheikh and others accused be proceeded with and the proceedings in the case in which Sheikh Samir is the complainant be stayed until the disposal of the other case.

A. T. M.

Reference accepted.

(1) (1886) I. L. R. 14 Calc. 358.

Before Mr. Justice Cuming, and Mr. Justice B. B. Ghose.

HAMID ALI

v.

SRIKISSEN GOSSAIN AND ANOTHER.*

CRIMINAL.

1922.

December, 11.

Illegality—Criminal Procedure Code (Act V of 1898), Secs. 342, 537—Compliance with law—Examination of prosecution witnesses after statement of accused taken.

The trial Court after recording the deposition of two witnesses for the prosecution recorded the statements of the accused. Later four witnesses for the prosecution were examined and charge framed. After that further statements of the accused were recorded :

Held, that the omission to comply with the requirements of section 342 of the Code of Criminal Procedure was an irregularity which could not be cured by section 537. All the proceedings after the statement of the accused had been recorded were vitiated in law : *Tilak Gopi v. Bhaya Ram* (1) and *Mitarjit v. Emperor* (2).

The provisions of the Code of Criminal Procedure are to be strictly observed.

Where the terms of the Code of Criminal Procedure are perfectly clear, they would not be deliberately disregarded.

The accused Srikissen with two others were convicted for offence under section 342 Indian Penal Code and each sentenced to pay a fine of Rs. 40, in default one month's rigorous imprisonment.

The material facts appear from the following

Order of Reference.

On the evening of 7th Baisakh last while complainant Hamid Ali was passing by the Local Board road by the front of Chatradhari's house he was called there. He refused. The accused Srikrishna and Ganesh Sonar with two others thereupon came up and seized and carried him to Chatradhari's house by force where he was horse-whipped and kicked by Chatradhari causing injuries. Complainant was, under Chatradhari's order, tied in the waist with a rope and kept confined in his bungalow for the whole night. On the following day at noon he was released by Uday Chand Sarpanch.

* Criminal Reference No. 164 of 1922, by P. N. Roy Chowdhuri, Esq., Additional District and Sessions Judge of Sylhet, dated the 25th November, 1922, for revision of order of Moulvi Mohammed Chaudhuri, Extra Assistant Commissioner of Karimganj, dated the 30th August, 1922.

(1) (1921) 62 I. C. 870,

(2) (1921) 63 I. C. 825.

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and with Arif Chaukidar he went to Patharkandi Police Station and lodged Ezahar. The police, after enquiry, submitted charge sheet and the petitioners with 2 others were convicted for offence under section 342 Indian Penal Code and each sentenced to pay a fine of Rs. 40 in default one month's rigorous imprisonment.

Order recommended for revision.—The order of Maulvi Md. Chaudhuri, Extra Assistant Commissioner of Karimganj, dated the 30th August 1922, convicting the petitioners under section 342 Indian Penal Code and sentencing them each to pay a fine of Rs. 40 in default one month's rigorous imprisonment.

In what particular portion of that order the Court making the reference considers an error on a point of law to exist?—The whole of it.

The ground upon which in the opinion of such Court the order should be reversed:—The conviction and sentence by the trial Court has become vitiated and liable to be set aside in as much as requirements of section 342 Criminal Procedure Code have not been complied with. The trial Court after recording the deposition of P. W. 1 and 2 recorded the statements of the accused persons on 12th July, 1922. P. W. 3, 4, 5 and 6 were examined on the 27th July 1922 and charge framed on that date; but since then no further statements of the accused persons were recorded. It has been repeatedly ruled by the Hon'ble Judges of the High Courts that this omission is an irregularity which cannot be cured by section 537 of the Code of Cr. Procedure. It is contrary to the provisions of section 342 Cr. P. C. and according to the recent ruling of the Calcutta High Court in revision case No. 569 of 1922 (Sylhet) it has been clearly laid down by the Hon'ble Mr. Justice Walmsley and Justice Ghosh on the 31st of August last that all the proceedings after the statements of the accused persons had been recorded were vitiated in law and the case came on remand to be taken up after the examination-in-chief of these witnesses have been over [The cases *Metarjit v. Emperor* (1) and *Tilak Gope v. Bhaya Ram* (2) are also to the point].

The provisions of section 342 Cr. P. C. is mandatory. The explanation of the trial Court that "the accused when examined made.....and definite statement" cannot alter the plain words of the law: [*Jyatish v. Emperor* (3) and *Queen v. Issur Raut* (4)]. This is an error in law which prejudiced the accused persons in the trial. I, therefore, consider that the convictions and sentences of the petitioners cannot stand and should be set aside.

(1) (1921) 63 I. C. 825.

(2) (1921) 62 I. C. 870.

(3) (1909) I. L. R. 30 Calc. 955.

(4) (1867) 8 W. R. Cr. 53 (64).

No one appeared for the Complainant.

No one appeared for the Accused.

The following judgment was delivered.

We have no alternative but to accept this reference in view of the recent rulings of this Court.

The finding and sentence must therefore be set aside and the trial resumed from the point where the Court examined the accused person after the examination of the prosecution witness concluded. We would impress on the learned Magistrate the necessity for a strict observation of the provision of the Code of Criminal Procedure and where the terms of the Code are perfectly clear there is no excuse whatever for a deliberate disregard of them.

A. T. M.

Reference accepted.

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CRIMINAL REVISION.

Before Mr. Justice C. C. Ghose, and Mr. Justice Chotzner.

NATABAR GHOSE

v.

ADYA NATH BISWAS.*

CRIMINAL.

1922.

December, 21.

Witnesses—Examination of—Arguments heard—Criminal Procedure Code (Act V of 1898), Sec. 540.

After both sides had closed their respective cases, after arguments had been heard and a date had been fixed for delivery of judgment in a protracted hearing of the case, two witnesses who were named by the prosecution, were examined before the Magistrate—the Magistrate having exercised his powers under section 540 of the Code of Criminal Procedure :

Held, that the procedure adopted by the Magistrate was entirely unjustifiable.

* Criminal Revision No. 908 of 1922, against the order of Babu Jatindra Mohan Sinha, Deputy Magistrate, of Krishnagar, dated the 28th August, 1922, affirming that of Babu H. Sen, Sub-Deputy Magistrate, 2nd Class, of Kushtia, dated the 24th August, 1922.

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1922.

Natabar

v.
Adya Nath.

Application for Revision by the Accused.

Complaint under section 408 Indian Penal Code.

The petitioner was convicted under section 408 Indian Penal Code and sentenced to undergo rigorous imprisonment for six weeks and also to pay a fine of Rs. 50, in default to suffer further rigorous imprisonment for four weeks. This conviction and sentence were upheld on appeal.

The material facts appear from the judgment.

Babus Dasaratih Sanyal and Dwijendra Krishna Dutt for the Petitioner.

Babus Manmatha Nath Mukherjee and Panna Lal Chatterjee for the Opposite Party.

The judgment of the Court was as follows :

In this case a complaint was lodged against the accused Natabar Ghose on the 27th October, 1921, under section 408 Indian Penal Code. From the order-sheet which has been placed before us by Mr. Sanyal who appeared on behalf of the accused, it is clear that there was a protracted hearing of the case before the Sub-Deputy Magistrate of Kushtia; the case for the prosecution was not closed till the 9th June, 1922, and the case for the defence was not closed till the 14th July, 1922. Arguments on behalf of the prosecution were heard on the 18th July and the 25th July, 1922 was fixed as the date for delivery of judgment. It appears that on the 28th July, 1922, after both sides had closed their respective cases and after arguments had been heard and a date had been fixed for delivery of judgment, two witnesses who were named by the prosecution were examined before the Magistrate, the Magistrate having exercised his powers under section 540 Criminal Procedure Code. The accused rightly complains before us that the procedure which was adopted by the Magistrate was one which was entirely unjustifiable. It is pointed out on behalf of the accused that although the terms of section 540 are very wide, the wider the power, the more cautious should be the exercise of discretion on the part of the magistrate. There is a great deal of force in this argument and we think that the action of the Magistrate in summoning the two witnesses on the 28th July, 1922, cannot be justified on any view of the matter.

The conviction of the petitioner under section 408 and the sentence imposed on him must, therefore, be set aside and the case against the accused must be retried. Such retrial is to be held before a Magistrate other than the Sub-Deputy Magistrate who ori-

December, 21.

ginally tried this case or by such magistrate as may be nominated by the District Magistrate.

The accused will remain on the same bail till the disposal of the case by the new Magistrate.

A. T. M.

Rule made absolute.

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CIVIL RULE.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Rankin.

SRI PRATAB CHANDRA DEO DHABAL DEB

v.

SRI RAJA JAGADISH CHANDRA DEO DHABAL DEB *

Receiver—Appointment of—Appeal, pendency of—Impartible raj.

Where the subject matter of the litigation was a valuable impartible raj including forest and mines, which had been under the management of the Court of Wards and the Encumbered Estates Act authorities for nearly half a century the High Court appointed a Receiver instead of allowing execution of the decree of the trial Court to proceed at the instance of the successful claimant pending disposal of the appeal by the Court.

Rule issued at the instance of the Defendant Appellant.

The plaintiff respondent took out execution of the decree and wanted delivery of possession of the estate.

The material facts appear from the judgment.

Babu Dwarka Nath Chuckerbutty, Dr. Dwarka Nath Mitter, Babus Pyari Mohan Chatterjee, Roma Prosad Mookerjee and Krishna Lal Banerjee for the Appellants.

Sir B. C. Mitter, Babus Ram Chunder Mozumdar, Brojo Lal Chakraborty, Suresh Chunder Das and Pramatha Nath Bando-padhya for the Respondent.

C. A. V.

The judgment of the Court was delivered by

Mookerjee J.—The subject matter of the litigation, which has given rise to this rule, is the Dhalbhum estate, described in these proceedings as an impartible raj subject to the operation of

* Civil Rule No. 117 F. of 1922.

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Meekerjee, J.

the rule of lineal primogeniture among the members of a family governed by the Mitakshara school of Hindu law. Raja Satrugandeo Dhabal Deo, the last holder of the Raj, died on the 1st March, 1916. He was at that time a disqualified proprietor and his estate was under the management of the Encumbered Estates Act authorities. Upon his death, disputes broke out as to the succession to the Raj. The plaintiff claimed the estate under a testamentary instrument executed by the deceased so far back as the 11th May, 1905. The defendant claimed title as the next taker under the Hindu law. There was the usual preliminary controversy in the matter of land registration before the revenue authorities. The Deputy Commissioner, the Commissioner, and the Board of Revenue successively upheld the claim of the present petitioner, and the estate continued in the possession of the Collector of Singbhum on behalf of the Court of Wards. The order of the Board of Revenue was passed on the 13th July, 1917, and the present suit was instituted by the plaintiff on the 17th March, 1921 for recovery of the estate upon establishment of title on the basis of the Will. After a protracted trial, the suit was decreed on the 21st August, 1922. An appeal was thereupon lodged in this Court on the 30th August, 1922. The plaintiff meanwhile took out execution of the decree and had a notice issued on the Manager of the Court of Wards to deliver the estate to him. The present rule was thereafter issued at the instance of the appellant in order that execution might be stayed and the subject matter of the litigation placed in the hands of a Receiver.

The value of the property in dispute is stated in the plaint as Rs. 11,99,000. Besides moveable properties, it includes a sum of five and half lakhs invested in War Bonds and numerous villages situated in the Provinces of Bengal, Behar and Orissa. A considerable portion of the estate was granted in temporary ijarah by the late proprietor on the 8th March, 1905 to the Midnapur Zemindari Co. for a term of 25 years. Since the death of the grantor, there appear to have been negotiations between the Court of Wards and the Company for purchase of the remainder of the term, and an attempt was made to complete the transfer during the pendency of the litigation in the Court below. The completion of the transaction was, however, stopped by order of the Subordinate Judge. In this connection, our attention has been drawn to a passage from the volume on Singbhum in the Bengal District Gazetteers Series prepared by Mr. O'Malley and published by the Government.

"In the midst of these troubles, the proprietor Babu Satrugan

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Deo Dhabal Deb, an old man of 75, having incurred debts to the extent of four lakhs of rupees, the estate was, on the application of his heir, brought under the protection of the Chota Nagpur Encumbered Estates Act, VI (B.C.) of 1876. Meanwhile, the proprietor had leased out the whole estate for 25 years on terms which left no margin of profit to the lessees from the existing assets of the estate, and were a direct incentive to illegal rent enhancement and to interference with established rights. Very serious administrative difficulties were apprehended, and, accordingly, on the recommendation of the local officers, the sanction of the Government of India was obtained to the initiation of the (Settlement) operations". Apart from the lands leased out to the Midnapur Zemindari Co. there is a considerable tract in the direct possession of the proprietor. The extent of such territory cannot be determined with precision from the materials on the record, but it has been stated that in addition to the net rent of Rs. 59,435 annually payable by the Company, there is a net annual profit of Rs. 35,145 derived from forests, minerals, markets and fisheries. The plaintiff contends that he should be placed in possession of the estate and offers to furnish security to such extent and of such description as the Court may direct. The defendant urges on the other hand, that the management should be placed in the hands of a Receiver for the protection of the estate which requires to be developed and managed with special care. Our attention has also been drawn to the significant fact that, in the past, there have been such difficulties in connection with the management of the estate, which is situated in a backward tract inhabited principally by aborigines, that for nearly half a century the Government have been obliged to keep the management in the hands of the Court of Wards or of the Encumbered Estates Act authorities; thus, the Court of Wards had possession during the years 1867-83, 1886-89, 1920-22 and the Encumbered Estates Act authorities during the years 1905-1920. The plaintiff himself, while anxious to be placed in possession, is not slow to hint that even under the administration of these public authorities, there has been danger of waste, and that suits for resumption instituted by the Court of Wards have not only to be continued and looked after but that fresh suits for the same purpose require to be instituted. The plaintiff, on the other hand, does not hesitate to assert that it is necessary to control and supervise the management of such influential lessees as the Company in their dealings with the aboriginal tenants. Steps have also to be taken to get back from the Company tenures and under-tenures purchas-

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ed by them as ijaradars, and to recover from the representatives of Prince Bukhtier Shah, valuable mining rights improvidently granted to him by the late proprietor. We have taken into consideration these and other facts connected with the history of the estate, as also its present condition, and we have arrived at the conclusion that the best interest of the estate will be served if during the pendency of this appeal it is placed in the hands of a Receiver who will act under the direction of this Court and we order accordingly. The plaintiff and the defendant will be at liberty to submit within two weeks the names of suitable persons. A letter will also be addressed to the Board of Revenue, Behar and Orissa, with the request that one or more suitable names may be suggested. After the appointment of the Receiver, the Court will deal with such applications as may be made for directions as to the disposal of the corpus or of the income of the estate.

A. T. M.

Rule made absolute.

PRIVY COUNCIL.

PRESENT: *Lord Atkinson, Lord Parmoor, Lord Carson, Sir John Edge, and Mr. Ameer Ali.*

DINBAI

v.

K. B. NUSSERWANJI RUSTOMJI AND OTHERS.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF SIND]

Will—Construction—English rule—Period of distribution.

The rule of law is to ascertain the intention of the testator as declared by him, and apparent in the words of his will, and to give effect to this intention so far as, and, as nearly as may be, consistent with law.

In cases where a testator, in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *prima facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. The rule has no other effect than to

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attribute to the words used their natural and primary meaning, unless that meaning is displaced by the context; *Hood v. Murray* (1).

A Parsi Will will not be construed in the light of rules of construction which have been applied in English decisions; *Narendra v. Kamalbasini* (2) and *Bhagabati v. Kali Charan* (3).

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Appeal against the decision of the Judicial Commissioner of Sind, affirming that of the Additional Judicial Commissioner.

The appeal relates to the construction of the will of one N. N. Pochaji, a Parsi inhabitant of Karachi, who died there in August, 1908. The material facts, as well as the relevant portions of the will, are mentioned in their Lordships' judgment.

Upjohn K. C. and *Raikes* for the Appellant.

De Gruyther, K. C. and *Brown* for the Respondents.

The judgment of their Lordships was delivered by

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Lord Parmoor: The question for decision in the appeal is the construction of the will of N. N. Pochaji, a Parsi inhabitant of Karachi, who died there in August, 1908. The testator left a will dated the 21st June, 1907, of which probate has been granted to the respondents 1 and 2. The appellant is the widow of a son of Pochaji, named Jamsedji, and has obtained letters of administration to his estate. She asks for a declaration that as representative of Jamsedji she is entitled to a half of Jamsedji's four-sevenths share of the residuary estate of Pochaji under sections 3 and 6 of the Parsi Intestate Succession Act, 1865.

The action was tried by Mr. C. Fawcett, Additional Judicial Commissioner, who held that Pochaji, by the terms of his will, intended that the appellant should be entirely excluded from any share in the distribution, whether as heir of Jamsedji or otherwise. It is clear that the learned Judge appreciated the case put forward on behalf of the appellant before their Lordships. He states her claim to be that, though the will may exclude her from sharing as an heir of the testator, it does not exclude her as an heir of Jamsedji. This decision was confirmed in the Appellate Court, the Court holding that whatever might be the construction of the will in other respects, the appellant was excluded from claiming any share in the residuary estate of Pochaji by the clause "excluding the widow of Jamsedji from getting any share in such distribution."

(1) (1889) 14 A. C. 124.

(2) (1896) L. R. 23 I. A. 18 (26); I. L. R. 23 Calc. 563.

(3) (1911) L. R. 38 I. A. 54; I. L. R. 38 Calc. 468; 13 C. L. J. 434.

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The general principle to be applied in the decision of the appeal is not in dispute. The rule of law is to ascertain the intention of the testator as declared by him, and apparent in the words of his will, and to give effect to this intention so far as, and, as nearly as may be, consistent with law. In the present instance no issue of inconsistency with law arises, so that the only question is one of construction. Pochaji, a Parsi merchant at Karachi, made his will in the English language. It is not necessary to set out the whole will, but clauses 7 and 8 are as follows :—

"7. From and after the death of my wife my executors shall stand possessed of the residuary trust estate upon trust to spend from and out of the same a sum of rupees two thousand for the funeral expenses of my wife and for other ceremonies for one year after her death, and shall hold the residue upon trust to pay the net income thereof to my son Jamsedji, for and during his lifetime and from and after his death upon trust for the widow and children of my son Jamsedji absolutely as tenants-in-common in such proportions that each male child shall get double the share of each female child, and the widow shall get the same share as a female child. Provided, however, that if any child of my son Jamsedji shall have died in his lifetime leaving a child or children him surviving, then such child or children shall take the share which his or her parent would have taken of the residuary trust estate, if such parent had survived my son Jamsedji, and if more than one the males always taking twice the share of the females.

"8. In the event, however, of the said son Jamsedji dying without leaving any issue how low soever, but only leaving a widow, then my executors shall pay out of such residuary trust funds a sum of rupees ten thousand absolutely to such widow, and in such case and also in the event of the said Jamsedji dying without leaving any widow or issue how low soever, my executors shall stand possessed of the balance of said residuary trust estate in trust to spend rupees two thousand for the funeral expenses of the said son Jamsedji and to appropriate a moiety of the balance to such charitable objects for the purpose of promoting liberal and religious education amongst the Parsi Zoroastrians of Karachi as my executors may in their discretion think fit, and divide the other moiety amongst my heirs according to the law of intestate among Parsis, but excluding the widow of Jamsedji from getting any share in such distribution."

In the event of her surviving him, Pochaji appointed his wife, Khursedbai, sole executrix and trustee of his will; but she predeceased her husband. At the death of Pochaji in 1905 he left

surviving him his son Jamsedji, Dinbai, Jamsedji's wife, (who is the appellant), two daughters, and four grandsons (who are respondents). Jamsedji died childless in May, 193, leaving his widow Dinbai surviving him. It is contended on behalf of the appellant that Jamsedji is one of the heirs named in the will of the testator, being thereby entitled according to the law of intestate succession among Parsis to four-sevenths of the moiety of the estate, and that his rights are now vested in the appellant as his administratrix, and that her rights as administratrix of the estate of Jamsedji are not effected by clause 8 of the will.

It will be convenient to consider, in the first place, the meaning of the words "excluding the widow of Jamsedji from getting any share in such distribution." In substance the counsel for the appellant suggested two limitations on these words. It was argued that the distribution was completed by the allocation of the residuary estate amongst the heirs of Pochaji, and that the words did not apply to any subsequent devolution of the property. Their Lordships are unable to accept this interpretation, and see no reason for dissenting from the opinion of the Appellate Court that they would apply to funds coming to the appellant as representative of Jamsedji, in the event of Jamsedji being included in the class of heirs to the testator. It was further argued on behalf of the appellant that these words were directed to exclude claims of the appellant which might have arisen under section 5 of Act XXII of 1865 if Jamsedji had died in the lifetime of the testator, leaving his widow surviving him. In the first place the words construed in their natural meaning contain no such limitation, and secondly clause 8 appears to contemplate conditions which will arise after the death of the testator, and when the provision of section 5, Act XXII, 1865, would have ceased to be operative. In any case there is no reason why the words "excluding the widow of Jamsedji from getting any share in such distribution" should not have their natural general meaning, and to limit them to the event of Jamsedji pre-deceasing Pochaji, is to introduce a limitation not to be found in the terms of the will. It may be true that Jamsedji might have defeated the intention of the testator by making a will, or in some other form alienating his interest in the residuary estate. The answer to this objection is that Jamsedji did not, in fact, either make a will or alienate his interest, and the testator may well have thought that this was an improbable contingency, and that he had sufficiently safeguarded the interests of the other members of his family.

It is pointed out in the judgment of the Appellate Court that

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on this construction of the words "excluding the widow of Jamsedji from getting any share in such distribution," it is not necessary to decide whether the words "my heirs" in paragraph 8 of the will include Jamsedji among the class. This issue, however, was argued at some length before their Lordships. The will was written in English, and there is no doubt that in a will so written the word "heirs" would naturally include heirs as at the date of the testator's death, subject always to a contrary intention being declared in a particular will. It is hardly necessary to re-state so clear a principle but reference may be made to the case of *Hood v. Murray*, (1). This was a Scotch will, and Lord Watson states the rule as follows :—

"The rule, as I understand it, is simply this, that in cases where a testator or settlor, in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *prima facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. In my opinion, the rule has no other effect than to attribute to the words used their natural and primary meaning, unless that meaning is displaced by the context."

Accepting this principle in its fullest sense, the question in the present appeal is whether the natural primary meaning has been displaced by the context. Various cases were referred to in the argument which depend on rules of construction, adopted in the construction of wills made in this country, and applicable to documents framed with the knowledge of the rules of construction which are afterwards applied to them. These cases are not of assistance in the construction of a Parsi Will made at Karachi. In *Bhagabati Barmanya v. Kali Charan Singh* (2), Lord Macnaghten, delivering the judgment, says :—

"It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent among those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and

(1) (1889) 14 A. C. 124.

(2) (1911) L. R. 38 I. A. 54 ; I. L. R. 38 Calc. 468 ; 13 C. L. J. 434.

the success of those rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules, in interpreting the instruments of Hindus, who view most transaction from a different point of view, think differently and speak differently from Englishmen, and who have never heard of the rules in question.

A similar opinion is expressed in *Narendra Nath Sircar v. Kamalbasini Dasi* (1).

"To construe one will by reference to expressions of more or less doubtful import to be found in other wills is, for the most part, an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desirable. To search and sift the heaps of cases on wills which cumber our English Law Reports in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost absurd."

It is therefore not necessary to examine the present will in the light of rules of construction which have been applied in English decisions. On the construction of the will of Pochaji their Lordships agree with the Appellate Court. In their opinion the testator did not intend that his son Jamsedji should take any interest under his will as an heir. The testator intended that the only interest in his property which Jamsedji should take or have was a right of maintenance under paragraph 6 during the lifetime of the testator's wife if she survived the testator, and a life interest under paragraph 7 in the testator's property undisposed of under the earlier paragraphs of the will, and that he did not intend to include Jamsedji as one of his "heirs" as that term is used in paragraph 8. If the contention of the appellant could be maintained, she would be entitled not only to Rs. 10,000 specifically bequeathed to her for her absolute use, but also to one-half of the four-sevenths of the moiety of the testator's residuary trust estate mentioned in the fifth paragraph of the will.

In their Lordships' opinion this would not be in accord with the intention of the testator as declared in the terms of his will,

(1) (1896) L. R. 23 I. A. 18 (26) ; I. L. R. 23 Calc 563.

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Their Lordships will humbly advise His Majesty that the appeal shall be dismissed with costs to be paid out of the estate.

Watkins and Hunter: Solicitors for the Appellant.

Wontner and Sons: Solicitors for the Respondents.

A. T. M.

Appeal dismissed.

PRESENT: *Lord Phillimore, Lord Carson and Sir John Edge.*

SUBRAMANIA PILLAI AND OTHERS

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v.

RAJAH KUMARA VENKATA PERUMAL RAJU

BAHADUR VARU AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS].

Limitation—Limitation Act (IX of 1908), Sch. I Art. 113—Agreement for reconveyance—Mortgage for principal and interest—Charge.

By a contract dated the 28th August, 1888, the defendant consented to reconvey on the 16th October 1889 certain villages on receipt of stated consideration. He also agreed not to sell to others without the consent of the plaintiff. The agreement provided for payment of interest on the purchase money until paid, and that until the principal and interest were paid, the plaintiff should mortgage the villages which the defendant consented to sell or other villages and execute a document therefor. On the 23rd August, 1900, the plaintiff called upon the defendant to execute a conveyance of the villages to him and to tender a mortgage for execution by him. The defendant refusing, the plaintiff brought this suit for recovery of possession from the defendants of villages on payment of such sum, if any, as might be found due.

Held, that no charge was created by the contract over the villages and that the plaintiff had no right to recover possession of the property absolutely or conditionally on his executing a mortgage deed or making a payment to the defendant. Hence the suit being one for specific performance of a contract, it was barred under article 113, schedule I of the Limitation Act.

Appeal from the decree of the High Court of Madras, reversing that of the Subordinate Judge of North Arcot.

The material facts appear from the judgment of their Lordships.

Appeal by the Defendant.

De Gruyther K. C. and *Dube* for the Appellants.

J. M. Parikh for Respondents Nos. 8 to 10.

C. A. V.

The judgment of their Lordships was delivered by

Lord Carson :—In this suit the present Rajah of Karvetnagar seeks to recover possession from the defendants of certain villages on payment of such sum, if any, as may be found due.

Both the Subordinate Judge of North Arcot and the Judges of the High Court of Judicature at Madras were in agreement that the legal relation between the plaintiff and the first defendant is settled and determined by a contract in relation to the said villages entered into on the 25th August, 1888, between Sri Maharajulanga, the plaintiff's father, and the first defendant. Saravana Pillai, who was the first defendant, is now dead, but is represented in this appeal. The remaining defendants claimed to be *bona fide* purchasers for value from the first defendant without notice of any claim by the plaintiff. The Subordinate Judge held that upon the construction of the said contract Saravana Pillai was the owner of the villages, and agreed to sell the same to the plaintiff for a consideration of Rs. 99,568-15-6, to be paid or secured as stated in the fifth paragraph of the said contract of the 25th August, 1888. The High Court, on the other hand, held that upon the true construction of the contract the plaintiff was the beneficial owner of the villages and Saravana Pillai only the legal owner, and that in the matter of pecuniary obligations incurred by Saravana Pillai in connection with the purchase of the villages, and in the matter of the other money dealings between him and the plaintiff, there was found due from the plaintiff a sum of Rs. 99,568-15-6 in settlement of accounts. It is admitted in the judgments of the High Court that if the said contract were a contract for sale the suit would essentially be one for the specific performance of a contract, and in that case it would be clearly barred under Article 113 of the Limitation Act. It is well to bear in mind that the terms of this section relate to any contract.

On the view taken by the High Court of the contract, however, it was held that the suit is really one for the possession of immovable property by a beneficial owner thereof against the legal owner on payment, if necessary, of such sum, if any, as may be found due; that the execution of a conveyance by the first defendant to the plaintiff was not essential, and is unnecessary if he gets a decree for the recovery of the villages as beneficial owner.

The villages in question originally belonged to the plaintiff's late father—the then Zamindar of Karvetnagar. They were sold in 1883 in Court auction in O. S. No. 5 of 1879, and purchased by

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the first defendant as stated in the contract. It is alleged by the plaintiff that this purchase was made on behalf of the plaintiff's father; that a part of the purchase money was paid out of his funds and the balance obtained from one Krishnama Chari, to whom the villages appear to have been sold by the first defendant subject to a condition of reconveyance on payment of a stipulated sum. A suit to compel such reconveyance was instituted in the High Court at Madras, and on the 16th October, 1889, a decree directing reconveyance was made. In pursuance thereof a conveyance was duly executed on the 7th February, 1890, and since that date the first defendant had until he died been in possession of the villages, acting as the absolute owner thereof. The contract of the 28th August, 1888, was entered into during the pending of the original suit. It recites briefly the facts above stated and refers to the pendency of the said suit, and then proceeds as follows:—

“Under these circumstances, under the order of Sri Maharajulangu the accounts were looked into in their presence in respect of items due to the said Saravana Pillai relating to the said villages, and also relating to all money transactions between Saravana Pillai and Sri Maharajulangu. On looking into the accounts, the amount found due to the said Saravana Pillai was Rs. 99,568-15-6. Saravana Pillai consented to receive this sum of rupees, etc., and sell the aforesaid villages to Sri Maharajulangu.”

Whatever may have been the original nature of the purchase by Pillai or the arrangements entered into to raise the purchase money, this contract was a settlement of questions of account in relation to the said villages and other matters, and under the terms of it Pillai is treated as the legal and beneficial owner. The second clause of the contract further strengthens this construction. It provides that as soon as Pillai obtains a decree in the suit already referred to (which, as pointed out, he did obtain), he should sell the villages to Maharajulangu, and the said Maharajulangu should purchase the same for the sum of Rs. 99,568-15-6. “He should not sell to others without the consent of the Maharajulangu”—a provision which would be meaningless unless he was the legal and beneficial owner. The fifth clause of the agreement provides for payment of interest on the purchase money until paid, and that until the principal and interest are paid the Maharajulangu should mortgage the villages “which Saravana Pillai has consented to sell, or other villages etc.”—properties which are acceptable to Saravana Pillai as security for the said principal and interest—and execute a document therefor. The plaintiff took no further action in the terms of

the said contract. In the year 1899 his estate was taken under the management of the Court of Wards, and this suit was instituted by the Manager appointed by the Court of Wards on the 24th August, 1900. Before instituting this suit, it is to be observed that on the 23rd August, 1900, the acting Secretary to the Court of Wards, by a notice in writing, called upon the first defendant to execute a conveyance of the villages to him on behalf of the plaintiff and to tender a mortgage for execution by him on behalf of the plaintiff.

Their Lordships agree with the Subordinate Judge that no charge is created by the contract over the villages in question, and that the plaintiff had no right to recover possession of the property absolutely or conditionally on his executing a mortgage deed or making a payment to the first defendant.

The suit, therefore, becomes one for the specific performance of a contract which is barred by the section of the Limitation Act already referred to.

This Board are, for the reasons stated, of opinion that this appeal should be allowed and the judgment of the Subordinate Judge restored, and that the appellants should have their costs in the Courts below and of the appeal. It is unnecessary, having regard to this conclusion, to consider the case of the respondents, the legal representatives of defendant No. 3—for whom Mr. Parikh appeared—further than to say that it was agreed in the course of the argument by Mr. De Gruyther, counsel on behalf of the appellants—that the interests of Mr. Parikh's clients should not be affected by any question of any statutes of limitation which might be raised in answer to their claim, owing to the delay which has been occasioned by the institution and the carrying out of the proceedings in this suit, and their Lordships so determine.

Their Lordships will humbly advise His Majesty accordingly.

John Josselyn : Solicitor for the Appellant.

Barrow, Rogers, & Nevill : Solicitors for the Respondents.

A. T. M.

Appeal allowed.

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PRESENT : *Lord Phillimore, Lord Carson, and Sir John Edge.*

RAI RADHA KRISHNA AND OTHERS

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BISHESHAR SAHAY AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA].

Limitation—Limitation Act (IX of 1908), Sch. I. Art. 12—Decree-holder praying to bid but refused—Purchase by decree-holder—Civil Procedure Code (Act XIV of 1882), Sec. 294 or (Act V of 1908) O. 21 R. 72.

A purchase by a decree-holder who has not obtained permission from the Court is not void, nor a nullity but is only to be avoided on the application of the judgment-debtor or some other person interested. The fact that a decree-holder applied for permission and was refused, does not make any difference. He is still a decree-holder who has not obtained permission to bid. In the case of such a purchase, the question is not whether the decree-holder was contumacious, but whether the property had been really realised to the best advantage. If it had not, the Court would set the sale aside; if it had, then it mattered not that the decree-holder bought without permission as that he had applied and been refused. If the sale is voidable only and not void, article 12, schedule I of the Limitation Act applies, and a suit to set aside such a sale must be brought within one year.

Appeal from the decree of the Patna High Court dated the 27th February, 1919, reversing that of the Subordinate Judge of Mozaffarpur dated the 27th December, 1916.

Appeal by the Plaintiffs.

The material facts appear from the judgment of their Lordships.

De Gruyter, K. C., Parikh and Majid for the Appellants.

Dunne K. C. and *Dube* for the Respondents.

C. A. V.

The judgment of their Lordships was delivered by

Lord Phillimore :—Rai Gudar Sahay, a landowner in the District of Mozaffapur, borrowed from a joint family of money-lenders to whom the defendants belong, a sum of Rs. 16,000 on the 2nd May, 1873, and mortgaged for it his village Mouza Kataya. The family afterwards separated, and upon the partition of their property various fractions in the mortgage became allotted to the different members. They, however, all joined in a suit brought in 1886 to enforce the mortgage, and in the ordinary course obtained a decree on the 31st May, 1885, under which if the money was not paid the property was to be brought to sale.

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For a time no steps were taken to realise this decree, and the judgment debtor paid off portions by purchasing, through a *benamidar*, the shares of some of the decree-holders, for prices which it is noteworthy were considerably less than the nominal values. In January, 1889, he bought a share nominally worth Rs. 7,140 for Rs. 3,266; in March, 1891, a share nominally worth Rs. 15,209 for Rs. 5,000; and in November, 1894, shares nominally worth Rs. 24,619 for Rs. 7,476. This left something under 5 annas of the judgment unsatisfied, and these were held in severalty by the respondent Bisheshar Sahay and two of his brothers. In 1898 Bisheshar, on behalf of himself and the remaining decree-holders, took proceedings to have the decree executed, and the property was sold by the Court on the 18th April, 1899. By that time the judgment-debtor was dead, and his widow was proceeded against in his place. Upon the record of the execution proceedings one Hari Narain was declared purchaser of the village, and he obtained a certificate of sale and possession. The widow applied to set aside the sale on various grounds, but failed. She died in 1904 and was succeeded by her daughter, who died in 1910. Upon the daughter's death the estate of the original judgment-debtor devolved upon the appellants as the next heirs, and they in 1914 instituted the present suit, alleging that the proceedings at the sale had been collusive and fraudulent, that they had recently discovered that Bisheshar had applied to be allowed to bid and had been refused leave, but in spite of the refusal had purchased the village in the name of Hari Narain, who was his *benamidar*. The present appellants made certain other points which were disposed of in the course of the proceedings.

The respondent Bisheshar denied that Hari Narain was his *benamidar*, and said that Hari Narain was the true purchaser, who had since sold and transferred to him. He also took the point of the Statute of Limitations.

It must be taken to be true that he had applied to the Court for leave to bid and had been refused. Hari Narain purchased the property for Rs. 625 only and sold it, or purported to sell it to Bisheshar on the 9th December 1902 for Rs. 1,500. The case came before the Subordinate Judge, who by his decree, dated the 27th December, 1916, decided in favour of the plaintiffs, the present appellants. He held that the purchase by Hari Narain was made by him as *benamidar* for Bisheshar Sahay, and he thought that the Statute of Limitations did not apply, because he held that it was not a suit to set aside a voidable sale, but a suit to recover posses-

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sion of immovable property by the heirs in reversion on the death of the last female heir, and was therefore covered by Article 141 of the Indian Limitation Act.

Bisheswar appealed to the High Court, which by its judgment, dated the 27th February, 1919, reversed the decision, held that Hari Narain was not a *benamidar*, and further held that the suit was barred by Article 12 of the Indian Limitation Act as being a suit to set aside a sale in execution of a decree by a civil Court, for which the period of limitation is one year from the date when the sale is confirmed or would otherwise have become final and conclusive. If either of the defences raised by Bisheswar be established, the judgment of the High Court at Patna would be right and the suit would fail.

Their Lordships will consider first the question whether it was proved that the transaction was *benami*. There is, as admitted in the judgment of the High Court, ground for suspecting that the transaction might be of this nature. The Judge of first instance took it as established, though there is some question as to the regularity of the proof, that Hari Narain was in position a servant and a servant to a brother of Bisheswar, and one not likely to have money, though there was some evidence that he had engaged in commercial transactions. The sum for which the property was sold was exceedingly low. In the view of the Subordinate Judge it was worth Rs. 1,500 or Rs. 1,600 a year gross, from which should be deducted the revenue cesses amounting to about Rs. 400 a year. Not only, therefore, was the original price absurdly low, but Hari Narain, if he were the real purchaser, though making a considerable profit on the resale, nevertheless sold to Bisheswar for much less than he might have expected to get for the property.

But, on the other hand, the widow of the original judgment debtor, who seems to have been advised, made a number of objections to the sale and never raised this one, and the matter waited for upwards of 15 years, by which time Hari Narain was dead, before these proceedings were taken. It may be said that the widow and her advisers would not know who Hari Narain was, but the fact that the price was as low as it was would have put them upon inquiry, and indeed the witness for the plaintiffs, Khub Lal, if he is to be believed, told the widow's brother about it from the first. The fact that the decree holders were content to take so small a proportion of the nominal value of their shares in the decree seems to point to there being a deficiency in the mortgaged property. Moreover, Bisheswar's two brothers got in respect of their shares, which

together were larger than Bisheshar's, only their small proportion of the net proceeds of the sale, and as they would certainly have known who Hari Narain was, they must either have been satisfied that the sale was good and that no more could have been realised or they must have been parties to the fraud, which has not hitherto been suggested. Except the witness Khub Lal, whose evidence, taken as a whole, was unfortunate for the side which called him, and another witness whom the High Court thought unworthy of belief, there was nothing like affirmative evidence of a *benami* case.

Upon the whole, their Lordships agree with the view of the High Court that it has not been proved that Hari Narain was *benami* for Bisheshar. This is sufficient to dispose of the appeal.

With regard to the point on the Statute of Limitations as it was presented before the Courts in India, their Lordships are also of opinion that the decision of the High Court was right. The applicable section of the Code of Civil Procedure regulating sales in execution by the Court is as follows :—

" 29. No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

" When a decree-holder purchases with such permission, the purchase money and the amount due on the decree may, if he so desires, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

" When a decree-holder purchases, by himself or through another person, without such permission the Court may, if it thinks fit, on the application of the judgment-debtor or any other person interested in the sale, by order set aside the sale ; and the costs of such application and order, and any deficiency of price which may happen on the resale and all expenses attending it, shall be paid by the decree-holder."

Upon the construction of this section it is evident that a purchase by a decree-holder who has not obtained permission is not void nor a nullity, but is only to be avoided on the application of the judgment-debtor or some other person interested. It would be injurious to those interested in the sale if a decree-holder who had been forced up in the bidding to give a large sum of money could escape from fulfilling his contract by getting the sale declared a nullity, and it would make all titles under such sales insecure if at later periods they were liable to be treated as nullities. A sale is to be set aside upon application and upon cause shown.

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This position is well established and seems to have been accepted by the Subordinate Judge; but in his view the fact that the decree-holder had applied for permission and had been refused made a distinction. Their Lordships, however, cannot see that this makes any difference. He is still a decree-holder who has not obtained permission to bid. He is that and nothing more. If indeed an application were made under the last paragraph of the section, his conduct might be one of the points which the Court would take into consideration in determining whether it would avoid the sale or not. It is doubtful even then whether it would be of any importance. The question would not be whether the decree-holder had been contumacious, but whether the property had been really realised to the best advantage. If it had not, the Court would set the sale aside; if it had then it mattered not that the decree-holder bought without permission or that he had applied and been refused. If, then, the sale is voidable only and not void, Article 12 in the Act of 1908 applies, and the suit must be brought within one year. Therefore it was too late.

Counsel for the appellants took a further point. He urged that this case might be treated as one of concealed fraud, to which section 18 of the Act and Article 95 would apply, and that the fraud consisted in concealing from the Court that the decree-holder who had been refused was in fact buying through his *benamidar*. Their Lordships deem it unnecessary to consider this contention, which was never put forward or discussed in the Courts in India, and the foundation for which is deficient. There is indeed allegation but there is no proof of the time when the fraud, supposing that there were fraud, became known to the plaintiffs (appellants). Moreover, for this purpose the widow would represent the estate, and the Court would have to be satisfied that she did not know. In this connection the evidence of Khub Lal would have to be further considered, as well, perhaps, as that of other witnesses for the plaintiffs.

For these reasons their Lordships deem it unnecessary to express any opinion upon this contention, and, upon the whole, they will advise His Majesty that this appeal should be dismissed with costs.

Truefitt and Francis : Solicitors for the Appellants.

Barrow, Rogers and Nevill : Solicitors for the Respondents.

A. T. M.

Appeal dismissed.

PRESENT : *Lord Dunedin, Lord Phillimore, Sir John Edge,
Mr. Ameer Ali and Mr. Justice Duff.*

RAJANGAM AYYAR

v.

RAJANGAM AYYAR.

P. C.

1922.

July, 10, 11.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS]

Partition—Agreement for partition—Suit for specific performance, essentially a suit for partition—Agreement, if requires registration—Registration Act (XVII of 1908) Sec. 17 sub-sec. (2) Proviso 5—Agreement, if admissible in evidence.

By a *yadast*, or memorandum of agreement, the parties agreed to divide their joint properties both in Travancore and in British territories according to certain specified shares. The agreement provided for the execution of a further deed effectuating the partition. Later, effect was given to this agreement in respect of the properties in Travancore. This document was registered in Travancore, and effect was given to it in respect of the properties situated in that State. No division, however, was made of the properties in Tinnevely or separate possession to the parties of their respective shares. As the defendant evaded the fulfilment of the agreement, the present suit was brought for its enforcement :

Held, that the suit was one substantially for partition.

The onus was on the person to establish that the properties he claimed as the self-acquired properties, bore that character.

That as the agreement merely created a right in the person claiming the relief, it did not require registration under proviso 5 to sub-section 2 of section 17 of the Registration Act and it was admissible in evidence.

Appeal against the decree of the High Court of Madras, varying that of the Subordinate Judge of Tinnevely.

The material facts appear from the judgment of their Lordships. The defendant appealed.

Upjohn K. C. and *Dube* for the Appellant.

De Gruyther K. C. and *Narasimham* for the Respondent.

The judgment of their Lordships was delivered by

Mr. Ameer Ali : This appeal arises out of a suit brought by the plaintiff, Subramania Ayyar, since deceased, in the Court of the Subordinate Judge at Tinnevely, in the Madras Presidency, on the 21st December, 1915, under the following circumstances.

Subramania Ayyar, with his brother Krishna Ayyar, who died before the institution of the suit, formed a joint and undivided Hindu family subject to the Mitakshara law. They possessed considerable immovable properties both within the Travancore

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State and in British territories. The landed properties belonging to them in British India are situated in the Tinnevely district. In 1915 they decided to separate and make an amicable division of the properties belonging to them, both immovable and movable. By a *yadast*, or memorandum of agreement, dated the 7th January, 1915, which is marked as Exhibit Ay in these proceedings, they agreed to divide their properties both in Travancore and in British territories according to certain specified shares. Later, on the 1st February of the same year, effect was given to this agreement in respect of the properties in Travancore, under which Krishna Ayyar as the elder brother, obtained, under the designation of *jesthabhagam*, a larger share than would have come to him otherwise. This document was registered in Travancore, and effect appears to have been given to it in respect of the properties situated in that State. No division, however, was made of the properties in Tinnevely or separate possession delivered to the parties of their respective shares. Krishna Ayyar having died in the meantime, his son, the present defendant, evaded the fulfilment of the agreement embodied in Exhibit Ay; and accordingly Subramania brought the present suit for its enforcement.

In the plaint the relief asked for is a decree for partition by metes and bounds, and a direction to the defendant to execute a conveyance of the properties that should fall to the share of the plaintiff in terms of the agreement.

The defendant in his written statement raised three objections to the suit: firstly, that the agreement (Ay) had been obtained by Subramania from his father under undue influence; secondly, that a large portion of the properties in which the plaintiff claimed a share was his father's self-acquisitions and did not form part of the ancestral estate: and thirdly, that the agreement, not having been registered in British India, could not be admitted in evidence and no suit for specific performance could be based on it.

The District Judge held that the defendant had failed to prove his allegation of undue influence to invalidate the agreement on which the plaintiff relies. He also held that the defendant having admitted that there was a nucleus of ancestral property, it lay upon him to establish that the properties which he claimed exclusively, were acquired by his father, and this onus he had wholly failed to discharge.

With regard to the non-registration of the agreement the District Judge said as follows:—

“ I do not think that the fact that the *yadast* (Exhibit Ay) and

the document of partition (Exhibit Az) referred to in paragraph 8 of the plaint were not registered in British India precludes their admission in evidence."

And, relying upon a decision of the High Court of Madras, he held that "if a present right is created, the instrument, though unregistered, is admissible in evidence in a suit for specific performance, and I hold that they are admissible in evidence in this suit." He accordingly made a decree in favour of the plaintiff, declaring in the first place that the properties claimed by the plaintiff had fallen to his share, and directing that the defendant should put the plaintiff in possession of the property detailed in Schedules 1, 4 and 6 of the plaint and half of certain other properties, after dividing by metes and bounds. He made certain other directions on the same basis.

On appeal to the High Court the learned Judges held, in agreement with the first Court, that the defendant had utterly failed to prove that the memorandum had been obtained by undue influence, but they also held that the agreement Exhibit Ay, not having been registered in British India, was not admissible in evidence. Having regard, however, to the facts of the case and the admitted jointness of the parties until 1915, they directed a general partition in equal shares of the properties both in British India and the Travancore State.

The effect of the High Court's decision on the latter point is that it upsets the completed settlement embodied in Exhibit Az, which was duly executed and registered in the Travancore State, and which appears to have been carried into effect, the defendant or his father having got possession of the properties which fell to his share.

With regard to the properties in Tinnevely, the High Court considered, in agreement with the District Judge that the defendant having admitted an ancestral nucleus, it lay upon him to prove that the properties which he claimed were self-acquired.

The defendant, on appeal, contends that the High Court were not justified in turning a suit for specific performance of an agreement which, not having been registered, could not be given in evidence, into a suit for general partition, and that accordingly the present claim should be dismissed. He also contends that the High Court were wrong in decreeing a partition of the properties in the Travancore district.

In their Lordships' judgment the High Court, in upsetting the

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division of the Travancore properties, appear to have proceeded upon a misapprehension.

The *yadast*, as its name implies, was a memorandum regarding the cesser of jointness, which amounted to a declaration that from that time forth the parties became entitled to the possession and enjoyment of their properties in separate shares ; and it provided for the execution of a further deed effectuating the partition. It says :

"A partition deed in terms hereof shall be executed and registered in the office of the Sub-Registrar of this place, as also at Tinnevely, as early as possible ; that until then this shall itself be in force."

It then goes on to give a larger share to Krishna Ayyar, as the elder brother. In accordance with the provisions of the agreement, a formal deed of partition (Az) was executed and registered in Travancore relating to the Travancore properties. It was entered into between two persons *suri juris* fully competent to enter into the transaction. It is difficult to perceive how that transaction can be upset in a suit which relates to properties in Tinnevely, and asks for a partition of *those* properties alone. Subramania, no doubt in his plaint had said that he would bring a suit in the Travancore Court to set aside the division effected by Az, and it is possible that the statement led the defendant to throw every possible obstacle in the way of the plaintiff to get the relief he asked for. But it furnishes no ground, in their Lordships' opinion, to upset a completed transaction. The present suit must consequently be confined to the joint family properties situated in Tinnevely.

It has been contended that this is a suit for the specific performance of an unregistered contract ; and that the High Court dealt with it as one for general partition.

As regards the non-registration of the agreement, it is to be observed that section 17 of the Indian Registration Act, 1877, makes the registration of certain classes of documents compulsory. Among others :—

(b) "non testamentary instruments which purport to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property."

From this, Proviso V to Subsection 2 excepts the following :—

"any document not itself creating, declaring assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely

creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest."

Exhibit Ay is not a document by itself creating, assigning, limiting, or extinguishing any right or interest in immovable property; it merely creates a right to obtain another document which will, when executed, create a right in the person claiming the relief, and on that ground their Lordships think Exhibit Ay did not require registration, and accordingly is admissible in evidence, so far as it goes.

The learned Judges of the High Court were, however, perfectly right in the view that the onus was on the defendant to establish that the properties he claimed as the self-acquired properties of his father, Krishna Ayyar, bore that character.

The defendant examined a number of witnesses on commission, apparently in support of his statement, but the depositions of these witnesses do not appear to have been put in evidence, and the list attached to the District Judge's judgment, after mentioning the exhibits filed on the plaintiff's behalf and giving the names of his witnesses, contains the following entries:—

"Defendant's exhibits *nil*

Defendant's witnesses *nil.*"

Their Lordships are, therefore, of opinion that the decree of the High Court should be varied by confining the decree for partition to the properties held by the parties in the Tinnevely district; that save and except this variation the appeal should be dismissed. The case will go back to the High Court for remission to the District Judge in order that he may appoint a Commissioner to make the division of the properties by metes and bounds in equal shares and to allot to the plaintiff his half-share of the whole of the joint family properties situated in Tinnevely; that in case, owing to any circumstance, equal division cannot be made of any particular property to one party or the other the difference should be arranged for by the Commissioner subject to the decision of the District Judge. As the suit was one substantially for partition, their Lordships think that the parties should bear throughout the proceedings their costs, save and except that the defendant should pay to the plaintiff his half-share of the Court fees. Their Lordships will, therefore, humbly advise His Majesty accordingly.

Barrow Rogers and Nevill: Solicitors for the Appellant.

Douglas Grant: Solicitor for the Respondent.

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Decree varied.

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PRESENT :—*Lord Atkinson, Lord Sumner, Lord Carson and
Mr. Ameer Ali.*

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December, 20.

HARICHAND MANCHARAM

v.

GOVIND LUXMAN GOKHALE.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY].

*Sale of land—Agreement—Provision for preparation of "Bargain paper" by
Vakil—Construction—Specific performance of Contract.*

Where a contract of sale of land contained all the necessary terms and provided that the bargain paper shall be prepared by a Vakil, the latter provision cannot be construed as a condition precedent and the purchaser is entitled to have specific performance of the contract.

Ridgway v. Wharton (1) referred to ; *Von Hatsfeldt—Wildenburg v. Alexander* (2) distinguished.

Decree of the High Court affirmed.

Appeal (No. 23 of 1921) from a decree of the Bombay High Court, reversing a decree of the same Court in its original jurisdiction.

The suit was brought by the respondent for the specific performance of the contract of the sale of land in the City of Bombay. The defence was that the agreement provided that the bargain paper shall be prepared by a Vakil within two days and that therefore the contract was not a completed one entitling the respondent to specific performance.

The trial Judge, Marten J., dismissed the suit, holding that the agreements relied upon did not constitute a binding contract. On appeal Macleod C. J. and Heaton J. reversed this decision and granted specific performance to the respondent. Hence this appeal.

The facts and the terms of the documents are fully set out in their Lordships' judgment.

Upjohn K. C., De Gruyther K. C., Gregory K. C., Raikes and Parikh for the Appellant : The agreement between the parties is not a completed agreement. Both parties wished to have the help of a Vakil to prepare the bargain paper. The earnest money was to be paid on the execution of the bargain paper and the balance of the purchase money was to be paid within six months from the date of the bargain paper. These conditions show clearly that the documents relied upon did not constitute a binding contract as found by the

(1) (1857, 5 H. L. 237.

(2) (1912) 1 Ch. 284.

trial judge. A conditional agreement like this cannot be enforced by a decree for specific performance: *Winn v. Bull* (1); *Lloyd v. Nowell* (2); *Watson v. Mc. Allum* (3), and *Von Hatsfeldt-Wildenburg v. Alexander* (4). Reference was also made to *Roger v. Hadley* (5), and *Pym v. Campbell* (6), and S. 92, proviso 3 that oral evidence of a separate agreement is admissible.

Clauson K. C. Tomlin K. C. and *Gib-on* for the Respondent: The document relied upon amounts to a complete and binding contract. All that the Vakil had to do was to draw up a contract embodying the terms that were agreed upon between the parties. Oral agreement was not pleaded and the oral evidence of a separate agreement was rightly rejected. Reference was made to *Ridgway v. Wharton* (7); *Bonnewell v. Jenkins* (8), and *Rossiter v. Miller* (9).

Raihes replied.

The judgment of their Lordships was delivered by

MR. AMEER ALI:—The suit which has given rise to this appeal was brought by the plaintiff in the High Court of Bombay in its Original Civil Jurisdiction for a decree against the defendant for specific performance of a contract entered into on the 28th November, 1917, for the sale, by the defendant to the plaintiff, of certain immovable property in Bombay. Two documents in the Gujrati vernacular were prepared on the occasion, one of which was signed by the defendant Harichand Mancharam, the other by the plaintiff, the vendee, Govind Luxman Gokhale. Both bear one and the same date, and are practically in identical terms. The document executed by the defendant is marked in these proceedings as Exhibit "A"; the other, signed by the plaintiff, is marked Exhibit "A1." Exhibit "A", after giving the name and designation of the intending purchaser, the plaintiff, and describing the vendor, Harichand Mancharam, proceeds thus:—

"I agree to give you in sale the said immovable property, together with the messuage building (standing thereon), for the price of Rupees two lacs and fifteen thousand."

It then gives the "conditions" of the sale in these terms:—

"The conditions thereof are as follows:—

"1. The bargain paper in respect of the sale of the said immov-

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(1) (1877) 7 Ch. D. 29.

(3) (1922) 87 L. T. 547.

(5) (1863) 2 H. & C. 227.

(7) (1857) H. L. C. 238.

(9) (1878) 3 App. Ca 1124.

(2)^{*} (1825) 2 Ch. 744.

(4) (1912) 1 Ch. 284.

(6) (1856) E. & B. 37.

(8) (1878) 8 Ch. D. 70.

able Property shall be made through a vakil within two days from this day and at the time of making the bargain paper I am to take from you by way of earnest money in respect thereof Rs. 10,000 that is you are to pay the same to me and as regards Rs 2 lacs and five thousand being the balance you are to pay the same to me at the time of the execution of the sale deed by me and by way of earnest thereof I am to take from you that is to say you are to pay to me Rs. 10 ten thousand at the time of the (execution of the) bargain paper and the balance of Rupees two lacs five thousand is to be paid to me by you at the time when the deed of sale is executed by me.

"2. As regards the said Jaga premises to be sold suits are pending against me in the High Court. If perchance these suits are decided against me then this bargain shall be treated as cancelled and if such a thing happens then I am to return to you the Rs. ten thousand without interest received as earnest money by me.

"3. As to the costs in respects of stamp, registration, vakil, &c., in the matter of the said sale which may be incurred on behalf of both the parties *i.e.*, you and myself the same shall be totalled up and borne by you and me half and half.

"4. The time of completing the said matter of the said sale deed is agreed to be six months from the date of the bargain paper on the decision in the case being given in my favour during the said period,* I am to get passed, *i.e.*, made out marketable title for you and to complete the matter of sale. If perchance the suit pending in the High Court not disposed of within six months then this agreement shall be in force till the disposal of the said suit and on the said suits being decided in my favour I am to complete the matter of this sale, and if the High Court suits be decided in my favour within six months I am to complete and you are to get completed the matter of sale within six months.

"5. For the purpose of the sale you are to get for me the signature of Ishwarlal the adopted son of Shankerbhai along with your signature on the sale deed.

"6. In the matter of this sale I am not to pay brokerage.

"The agreement I have given and taken from you to the above effect of my and your free will and pleasure. The 28th day of November 1918 correspond with the sud 15th of Kartak 1974, Wednesday."

* The equivalent of 1 and you are partly altered in the original.

Exhibit "A1," after reciting the terms of the contract, in paragraph 7 says as follows:—

"7. This bargain is for the purchase of this immoveable property together with buildings and structures thereon, (you) have given and I have taken from you the agreement to the above effect, of our free will and pleasure. The 28th day of the month of November in the year 1918 (corresponding with the 15th of Kartak sud of Samvat 1974, Wednesday."

The case came on for trial before Mr. Justice Marten on the Original Side of the Court. The plaintiff contended that the two documents which formed the foundation of the suit, formed a completed contract whilst the defendant-vendor urged that it was only a provisional arrangement conditioned to the preparation by a vakil of a formal document evidencing the contract. The learned Judge framed a number of issues, but so far as the present appeal is concerned only the two following are material:—

"(1) Whether suit is maintainable having regard to fact that the writing sued on was conditional upon an agreement being entered into?

"(2) Whether there was a concluded contract between the parties and if so what are the terms thereof?"

At the trial the defendant attempted to tender some oral evidence to show what actually took place on the occasion when the parties entered into the agreement relied upon by the plaintiff. The trial Judge refused the application in these words: "I reject that evidence; irrelevant and inadmissible."

In their Lordships' opinion he was quite right, under section 92 of the Indian Evidence Act, in rejecting the evidence, and no attempt appears to have been made on appeal to take exception on behalf of the defendant to this part of Mr. Justice Marten's order. Their Lordships do not think it necessary to refer further to this matter.

On the main case the trial Judge came to the conclusion that Exhibits "A" and "A1" did not constitute a completed contract chiefly relying on the use of the words, "The conditions thereof are as follows." He considered that the condition that the "bargain paper" in respect of the sale shall be made by a vakil within two days from the date of the agreement was a condition to which the whole bargain was subject, so that until the vakil prepared a bargain paper "there was no completed contract." He accordingly dismissed the plaintiff's suit with costs. On appeal by the plaintiff to the High Court in its Appellate Jurisdiction the learned Judges

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(Macleod, C.J., and Heaton, J.) arrived at a different conclusion. They held that the two documents executed on the 28th November, 1917, constituted a "binding agreement," and that the provision relating to the preparation of a "bargain paper" by a vakil was not a condition to which the contract was subject, and accordingly they reversed the order of the trial Judge and decreed the plaintiff's suit.

On appeal before the Board it is urged, on behalf of the defendant as it was urged in the Appellate Court in India, that the Gujratihahers of the 28th November, 1917, represented only a provisional arrangement on which no decree could be made. In support of this contention various clauses in the document executed by the defendant were referred to. It is said that the fact that the bargain paper was to be made within two days from the date of the execution of the documents "A" and "A," and was to be prepared by a vakil, and that at the making of the bargain paper the earnest money is to be paid, shows that the real and effective contract was to be founded on the paper prepared by the vakil. Again, reference was made to Clause 4, Exhibit "A" viz., that "the time of completing the said matter of the said sale deed is agreed to be six months from the date of the bargain paper on the decision in the case being given in my favour during the said period." It may be remarked here that two suits had been brought against the defendant contesting his title to the property which he had bargained to convey to the plaintiff, and the reference in paragraph 4 is to these two suits. Their Lordships understand that these two actions were subsequently settled, and there is no dispute now as regards the title of the vendor (the defendant).

The appellant's counsel refers also in support of his contention, to the fact that formal documents were prepared by the defendant's solicitors, in which certain additional terms were inserted, and he urges that the insertion of those terms indicates that the original agreement entered into on the 28th November, 1917, was not intended to be a completed contract. On behalf of the respondent reliance has been placed on the whole tenor of the two documents, and especially on Clause 7 of Exhibit "A" to show that the parties intended to have a definite and completed agreement on that date when they executed those two papers, and what was left to be done by the vakil was only to embody the contract in a formal document and to insert in it such subsidiary terms as are usual in such conveyances. The learned Chief Justice points

out in his judgment that the word "conditions" used at the beginning of Exhibit "A," in connection with the preparation of the "bargain paper" by a vakil, does not mean that it is a condition to which the bargain is subject, but that it is only one of the "terms" of the contract. Their Lordships concur in that view.

He has also examined at some length the cases in which the principle applicable to the construction of such documents is laid down; it is, therefore, not necessary to refer to them in detail in this judgment. Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway v. Wharton*(1), the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In *Von Hatzfeldt-Wildenburg v. Alexander*(2) Lord (then Mr. Justice) Parker laid down that where "the acceptance by the plaintiff was subject to a condition that the plaintiff's solicitors should approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract," the negotiations did not form a binding agreement between the parties.

The facts of that case were wholly different from the present, but the judgment marks the difference between completed and binding agreement and one subject to a condition. Here Exhibits "A" and "A1" show clearly that the parties had come to a definite and complete agreement on the subject of the sale. They embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change. The reservation in respect of a formal document to be prepared by a vakil only means that it should be put into proper shape and in legal phraseology, with any subsidiary terms that the vakil might consider necessary for insertion in a formal document. The letter of the 1st December, 1917, by the defendant's attorney to the plaintiff's solicitor shows that the terms of the vernacular document "A" were regarded by them as forming the foundation of the contract. They are as follows :—

(1) (1857) 6 H. L. Cases, 237.

(2) (1912) 1 Ch. 284.

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"With reference to your letter of yesterday, delivered to us by your articled clerk after 4 p.m., we note that you agree that the alterations which you had made in the English draft agreement prepared by us and handed to your client are not in consonance with the terms of the Gujrati Chitti which our client gave to yours. We, however, do not agree with you that the English agreement as drafted by us originally, or as sent to you with our letter of the 29th ultimo, is not in consonance with the terms of the said Chitti."

Clause 7 of Exhibit "AI," to which reference has already been made, is explicit:

"This bargain is for the purchase of this immovable property, together with buildings and structures thereon, (you) have given and I have taken from you the agreement to the above effect, of our free will and pleasure. The 28th day of the month of November in the year 1918 (corresponding with) the 15th of Kartak sud of Samvat 1974, Wednesday."

It shows clearly that a completed bargain was intended by the plaintiff.

On the whole, therefore, their Lordships are of opinion that the judgment appealed from is correct, and that this appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

T. L. Wilson & Co.: Solicitors for Appellant.

Latley & Hart: Solicitors for Respondent.

K. V. L. N.

Appeal dismissed.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Chotzner.

RAJANI KANTA GHOSE AND OTHERS

v.

SHEIKH RAHAMAN GAZI AND OTHERS.*

CIVIL.

1922.

July 14, 17.

Execution sale, nature of—Bengal Tenancy Act (VIII of 1885), Sec. 158B sub-section (2)—Omission to serve notice on Co-sharer landlord—Co-sharer not objecting but withdrawing money—Contravening provisions of statute, effect of—Irregularity and nullity.

Where a co-sharer landlord being satisfied with the regularity of the execution proceedings, withdrew the money which was in Court in satisfaction of his dues, an omission to serve upon the co-sharer landlord the notice contemplated by sub-section 2 of section 158B of the Bengal Tenancy Act, did not nullify the sale or alter its character to that of a sale held in execution of a money decree: *Sarip v. Tilattama* (1), and *Ahamad Biswas v. Benoy* (2) distinguished.

It is open to a co-sharer landlord to waive the benefit of sub-section 2 of section 158 B of the Bengal Tenancy Act.

When the provisions of a statute have been contravened, if a question arises as to how far the proceedings are affected by such contravention, the matter should be determined with regard to the nature, scope and object of the particular provision which has been violated.

No hard and fast line can be drawn between a nullity and an irregularity. An irregularity is a deviation from a rule of law, which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever or is void and incapable of being validated. One useful test to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can, it amounts to an irregularity, if not it is a nullity: *Holmes v. Russell* (3).

If the provision of a statute has been enacted on grounds of public policy, an individual cannot waive it; but if it has been enacted for the benefit of an individual, he can waive it.

Appeals by the Plaintiffs.

Suits for recovery of arrears of rent.

The material facts appear from the judgment.

* Appeals from Appellate Decrees Nos. 2248 to 2252 and 2280 of 1920, against the decision of J. W. Nelson Esq. District Judge of Howrah, dated the 8th June, 1920, affirming that of Babu Rajendra Lal Chakrabarti, Munsif of Howrah, dated the 28th November, 1919.

(1) (1917) 43 I. C. 3. (2) (1919) 23 C. W. N 931.

(3) 9 Dow 28.

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Babus Mahendra Nath Ray and Bhupendra Kumar Ghose
for the Appellants.

Babus Surendra Chandra Sen, Biraj Mohan Mojumdar and
Gour Mohun Dutt for the Respondents.

C. A. V.

The judgments of the Court were delivered by

Mookerjee J.—This is an appeal by the plaintiffs in a suit for recovery of arrears of rent. The defendants denied the relationship of landlord and tenant during the years in claim. They urged in substance that the title of the plaintiffs had been extinguished as the result of a sale held in execution of a decree passed in a suit instituted under section 148A of the Bengal Tenancy Act.

The Court of first instance gave effect to this contention and dismissed the suit. Upon appeal the decree of the primary Court has been affirmed by the District Judge. On second appeal it has been argued that the question of title of the plaintiffs is *res judicata* in view of a decree made on the 29th April 1915 in a previous suit between the parties. This view has been rejected by both the Courts below. It is not necessary to examine in detail the scope of the earlier suit because we have arrived at the conclusion that the question now in controversy was not directly and substantially in issue in the previous litigation and was not finally decided therein. Consequently we have to consider the effect of the sale held on the 11th September 1913 in execution of a decree for arrears of rent in a suit instituted under section 148A of the Bengal Tenancy Act.

It is not disputed that the interest claimed by the plaintiffs was originally held under two landlords Dighapatia and Tagore. On the 13th July 1897 one Amarendra Nath Ghose purchased the tenancy at a sale held in execution of a decree obtained by Dighapatia against Panch Couri Ghose who was the recorded tenant. The right, title and interest of Panch Couri Ghose was subsequently purchased by Asutosh Ghose, the *proforma* defendant in the present suit, and Arunoday Ghose, the predecessor in interest of the plaintiffs at a sale held in execution of a money decree. The names of Asutosh Ghose and Arunoday Ghose do not appear however to have been recorded in the office of the landlord. The consequence was that Dighapatia brought a suit against one Behary Lal Roy who had purchased the tenancy at a sale in execution of a decree for arrears of rent on the 9th September 1902. This suit was instituted under section 148A of the Bengal Tenancy Act. A

decree was obtained in due course in the presence of Tagore, who was made a party defendant. No notice, however, was served upon Tagore under section 158B of the Bengal Tenancy Act and yet the decree was executed. At the sale which followed Kishori Mohan Srimany under whom the contesting defendants claim, became the purchaser on the 11th September 1913. We are invited to hold that the effect of this purchase by Kishori Mohan Srimany was to extinguish the interest acquired by Asutosh Ghosh and Arunodoy Ghose on the 10th March, 1902. The plaintiffs contended in the Courts below that the decree obtained by Dighapatia in the suit instituted under section 148A could not operate as a decree for the entire rent according to the provisions of the Bengal Tenancy Act, inasmuch as the notice contemplated by section 158B was not served on Tagore. This contention has been negatived by the Courts below. The point consequently reduces to this what is the effect of the omission of the co-sharer landlord who has instituted a suit under section 148A of the Bengal Tenancy Act to serve the notice contemplated by sub-section 2 of section 158B. The appellants contend that the result is to destroy the character of the decree as a decree for arrears of rent and to make it operative only as a decree for money so that at the sale which follows the right title and interest of the person named as the judgment-debtor alone passes. In support of this view reliance has been placed upon the cases of *Nanda Lal Chowdhuri v. Kula Chand Chowdhury* (1); *Sarif v. Tilattama* (2), and *Ahamad Biswas v. Benoy Bhusan Gupta* (3).

To determine the question raised before us it is necessary to investigate the scope and object of sub-section 2 of section 158B. That sub-section is in these terms. When one or more co-sharer landlords having obtained a decree in a suit framed under sub-section (1) or under section 148A applies or apply for the execution of the decree by the sale of the tenure or holding, the Court shall, before proceeding to sell the tenure or holding give notice of the application for execution to the other co-sharers. It will be observed that the section does not in express terms state the result of the failure to comply with this direction. The cases of *Sarif v. Tilattama* (2) and *Ahamad Biswas v. Benoy Bhusan Gupta* (3) laid down that the provisions contained in sub-section 2 of section 158B is mandatory and not directory and the failure of the Court to serve the notice rendered the sale invalid. In support of this view,

(1) (1910) 15 C. W. N. 820. (2) (1917) 43 I. C. 3.

(3) (1919) 23 C. W. N. 931.

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reliance was placed upon the decision of the Judicial Committee in *Raghunath Das v. Sundar Das khetri* (1), which turned on the true construction of section 248 Civil Procedure Code of 1882, now replaced by Order 21 rule 22 of the Code of 1908. It must be remembered in this connection that the validity of the sale in the two cases mentioned was challenged by the co-sharer concerned and it may be conceded that the co-sharer who has not received the notice required to be served under sub-section 2 of section 158B is entitled to contest the legality of the sale on that ground. In the case before us the legality of the sale has been questioned by the co-sharer. On the other hand, as pointed out by the District Judge, that co sharer has adopted the sale, withdrawn his share of the purchase money and granted mutation of name to the purchaser. It may consequently be inferred that he knew of the sale and acquiesced therein. Can it be maintained, then, in such circumstances, that the sale was either a nullity or a sale inoperative as a sale under the Bengal Tenancy Act. The answer depends upon the scope and purpose of section 158B.

It was pointed out in the case of *Asutosh Sikdar v. Beharilal Kiritania* (2), that a sale held contrary to legislative enactment is not necessarily a sale absolutely without jurisdiction. It cannot be maintained on principle that because a sale has been held in contravention of a statutory provision, it must, irrespective of the nature and purposes of the provisions, be deemed to be null and void. Reference may be made to five decisions of the Judicial Committee in illustration of this principle. The cases of *Tasaddak Rasul Khin v. Ahmad Husain* (3) where a sale was held in violation of the provisions of section 250 C. P. C. *Gobindo Lal Roy v. Ram Janam Misser* (4), (where a sale for arrears of revenue was held in contravention of the provisions of sections 5 and 17 of Act XI of 1859) and *Malkarjun v. Narhari* (5), (where a sale was held contrary to the provisions of section 248 of the Code) amply show that there may be cases where the violation of an express provision of a statute may not nullify the proceedings. On the other hand, the cases of *Nusserwanjee Festonjee v. Meer Mynooddeen* (6), (where an arbitration proceeding was carried on contrary to the provisions of the Bombay Regulation VII of

(1) (1914) I. L. R. 47 Calc. 72; L. R. 41 I. A. 251.

(2) (1907) I. L. R. 35 Calc. 61.

(3) (1893) I. L. R. 21 Calc. 66.

(4) (1893) I. L. R. 21 Calc. 70.

(5) (1900) I. L. R. 25 Bom. 337.

(6) (1855) 6 M. I. A. 134.

1827) and *Subrahmania Ayyar v. King Emperor* (1), (where a trial was held in contravention of the rule of joinder of charges embodied in section 234 of the Criminal Procedure Code) are instances where failure to comply with the provisions of a statute completely vitiated the proceedings. The only rule that may be adopted is that, when the provisions of a statute have been contravened, if a question arises as to how far the proceedings are affected by such contravention the matter must be determined with regard to the nature, scope and object of the particular provision which has been violated. No hard and fast line can be drawn between a nullity and an irregularity. But this much is clear that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated. One test is well-established and is often useful; as was observed by Coleridge J. in *Holmes v. Russell* (2), "it is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

Now if the provision has been enacted on grounds of public policy, an individual cannot be permitted to waive it. On the other hand if the provision has been enacted for the benefit of an individual he is entitled to waive it. Tested from this point of view, what is the obvious purpose of section 158B sub-section 2. The object which the Legislature had in view was to protect the co-sharer landlord. The sale in execution of the decree made in the suit framed under sub-section (1) of section 158B or under section 148A has the effect of a sale under the provisions of the Bengal Tenancy Act; in other words, the tenure or holding in the hands of the purchaser can no longer be pursued by the co-sharer landlord for the realization of his dues, if any. The co-sharer landlord who has been made a party to the suit is restricted to the sale proceeds for the satisfaction of his dues. It is consequently necessary for his protection that he should have notice of the execution proceedings in time to ensure their legality or regularity. From this point of view, it is open to the co-sharer

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(1) (1901) I. L. R. 25 Mad. 61.

(2) 9 Dow. 23.

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landlord to waive the benefit of sub-section 2 of section 158B. This is precisely what has happened in this case. Here the co-sharer landlord was satisfied with the regularity of the execution proceedings. He withdrew the money which was in Court in satisfaction of his dues. In such circumstances, it is impossible for us to hold that the omission to serve upon the co sharer landlord the notice contemplated by sub-section 2 of section 158B either nullified the sale or altered its character to that of a sale held in execution of a money decree. The conclusion follows that the Courts below have correctly held that the purchase by Kishori Mohan Srimany on the 11th September, 1913, at the sale held in execution of the decree obtained by Deghapatia was to extinguish the interest of the plaintiffs, and the relationship of landlord and tenant was not in existence between the parties to this suit during the years in claim.

The result is that this appeal is dismissed. Nos. 2249, 2252 and 2280 of 1920.

In the view we take it is not necessary to consider whether these appeals are or are not competent. They are all dismissed.

Costs will be allowed in each of the appeals where the respondent has entered appearance.

A. T. M.

Appeals dismissed.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
 Mr. Justice Chotsner.*

UMA CHARAN CHAKRABARTI AND OTHERS

v.

NIBARAN CHANDRA CHAKRABARTI.*

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Limitation—Limitation Act (IX of 1908), Sch. I. Art. 181—Application for final decree—Decree on appeal, effect of—Decree fixing time for payment.

Where a preliminary decree in a mortgage suit has been affirmed on appeal, an application made within three years of the date of the affirmance with a view to make a final decree is within the period prescribed under article 181 schedule I of the Limitation Act.

* Appeal from original Decree No. 49 of 1921, against the decision of Babu Latu Behari Basu, Subordinate Judge of 24-Parganas, dated the 1st December, 1920.

If the decree of the Lower Court is reversed by the appellate Court, it is absolutely dead and gone : if, on the other hand, it is affirmed by the appellate Court, it is equally dead and gone, though in a different way, by being merged in the decree of the superior Court which takes its place for all intents and purposes ; both the decrees cannot exist simultaneously : *Ram Charan v. Lakhi Kant* (1) followed : *Juscurn v. Pirthi Chand* (2) distinguished,

Time runs from the date of the ultimate decree which terminates the litigation and becomes, as soon as it is passed, the only operative decree between the parties : *Raja Sashikanta v. Raja Sarat Chandra* (3).

When time is fixed by the lower Court for payment of money and the decree of the lower Court is confirmed on appeal, the time for payment runs from the date of the decree of the appellate Court though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree : *Gajadhar v. Kishan* (4) ; *Nizamuddin v. Bokra* (5) and *Jayanti v. Damisetki* (6) followed.

Appeal by the Defendants.

Application to make a final decree in a mortgage suit for sale.

The material facts appear from the judgment.

Babus Mahendra Nath Ray, Hira Lal Chuckerbutty, Promotha Nath Bandopadhyaya and Sib Chunder Palit for the Appellants.

Babus Ram Chunder Mazumdar, Charu Chunder Biswas, Bimala Charan Deb and Rama Prosad Mookerjee for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal against the final decree in a mortgage suit for sale. The decree has been assailed on the ground that it was made on the basis of an application under Order 34, rule 5, Sub-rule (ii) of the Code of Civil Procedure, which was presented after the lapse of the prescribed time. To test the validity of this argument it is necessary to refer to the salient facts in this case. The preliminary decree was made on the 16th July 1914 under section 96 of the Code of Civil Procedure, an appeal lay against this decree. Indeed under section 97 if an appeal was not preferred, the defendants would not be competent to challenge its correctness in an appeal against the final decree. An appeal was consequently lodged in this Court. The appeal was heard on the merits and the Court came to the conclusion that the decision of the Trial Court could not be successfully assailed. The result

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(1) (1871) 7 B. L. R. 704.

(2) (1918) I. L. R. 46 Calc. 670 ; 30 C. L. J. 71.

(3) (1921) 34 C. L. J. 415.

(4) (1917) I. L. R. 39 All. 641.

(5) (1918) J. L. R. 40 All. 203.

(6) (1921) I. L. R. 44 Mad. 714.

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was that the decision of the Trial Court was affirmed and the appeal was dismissed with costs on the 30th May, 1917. On the 24th March 1920, the present application was made under Order 34, rule 5, sub-rule (ii) in order that a final decree might be passed. The defendants urged that the application was barred by limitation under article 181 of the schedule of the Indian Limitation Act inasmuch as it had been presented more than three years after the 16th July 1914, when the preliminary decree had been made by the Primary Court. The Subordinate Judge over-ruled this contention on the authority of the decision in *Gajadhar Singh v. Kishan Jiwan Lal* (1). It has not been disputed before us that the contention of the appellants is opposed to the decision in *Gajadhar Singh v. Kishan Jiwan Lal* (1); *Nizamuddin v. Bohra* (2) and *Jayanti Venkayya v. Damiseti Sathi Raju* (3). These cases are authorities for the proposition that when a preliminary decree in a mortgage suit has been affirmed on appeal, an application made within three years of the date of the affirmance with a view to make a final decree is within the period prescribed under article 181 of the schedule of the Indian Limitation Act. We have been asked to hold however that these cases were erroneously decided and that they are contrary to the principle recognised by the Judicial committee in *Juscurn Boid v. Pirthichand Lal Chowdhury* (4). In our opinion this contention is not well-founded.

We shall assume for the purposes of the present case that an application to make final, a decree in a mortgage suit is governed by article 181 which provides that applications for which no period of limitation is provided elsewhere in the schedule or by section 48 of the Code of Civil Procedure 1908 must be presented within three years from the date when the right to apply accrues. On behalf of the appellants, it has been contended that as by the preliminary decree the mortgagors were permitted to redeem within six months from the date of the decree, that is, on or before the 16th January 1915, the decree-holders were bound to apply to make the decree final within three years from the 16th January 1915, that is, on or before the 16th January 1918. It may be conceded that this contention is, *prima facie*, well founded. But that does not justify the conclusion that the appellants are entitled to succeed in their contention. We cannot overlook the events which have happened between the 16th January, 1915 and 16th January, 1918.

(1) (1917) I. L. R. 39 All. 641.

(2) (1918) I. L. R. 40 All. 203.

(3) (1921) I. L. R. 44 Mad. 714.

(4) (1918) I. L. R. 46 Cal. 670; 30 C. L. J. 71.

The appeal preferred by the defendants in this Court had been dismissed on the 30th May, 1917 and it is incumbent on the Court to consider the legal effect of the decision of this Court on the rights of the parties.

We may usefully recall here the lucid exposition given by Mr. Justice Dwarkanath Mitter in *Ram Charan v. Lakhikant* (1) of the true effect of the disposal of an appeal upon the decree of the primary Court. If the decree of the Lower Court is reversed by the appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the appellate Court, it is equally dead and gone, though in a different way, namely by being merged in the decree of the superior Court which takes its place for all intents and purposes; both the decrees cannot exist simultaneously. This is in accord with the view expounded by Scotland, C. J. in *Arunachella v. Velu Dayan* (2), and was subsequently adopted by the majority of the full Bench in *Mahammad Sulaiman v. Mahammad Yar Khan* (3), where the observations of the Judicial Committee in *Kristo Kinkur v. Burroda Caunt* (4) were explained.

This principle has been repeatedly approved and illustrations of its application will be found in *Luchman v. Kishun* (5), which was decided by a Full Bench of this Court and followed the decision of the Judicial Committee in *Joseph Pitts v. Lafontain* (6) in *Muhammad Sulaiman v. Mahammad Yar Khan* (3) and *Mahammad Salaiman v. Fatima* (7), which were decided by two full Benches of the Allahabad High Court; and in *Rameswar v. Bhaba Sundari* (8); *Aghore v. Mahomed* (9), *Brijlal v. Mahadeo* (10); *Gujraj v. Swami nath* (11), *Kailash v. Girija* (12), and *Chandra Kant v. Lakshman* (13); which review many of the earlier decisions on the subject and show that the doctrine is supported by the judgment of the Judicial Committee in *Brij v. Tejbal* (14).

The decisions of the Judicial Committee in *Batuknath v. Munai* (15), and *Abdul v. Jawahir* (16) are clearly distinguishable, as based

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(1) (1871) 7 B. L. R. 704 (714).

(2) (1870) 5 Mad. H. C. R. 215

(3) (1888) 1. L. R. 11 All. 267.

(4) (1872) 14 M. I. A. 465.

(5) (1882) 1. L. R. 8 Calc. 218.

(6) (1880) 6 App. Cas. 482.

(7) (1882) 1. L. R. 11 All. 314.

(8) (1909) 11 C. L. J. 81.

(9) (1909) 11 C. L. J. 155.

(10) (1911) 15 C. L. J. 432.

(11) (1916) 1. L. R. 39 All. 13.

(12) (1912) 1. L. R. 39 Calc. 925.

(13) (1916) 24 C. L. J. 517.

(14) (1910) L. R. 37 I. A. 70; 11 C. L. J. 569; 1. L. R. 32 All. 295.

(15) (1914) L. R. 41 I. A. 104; 19 C. L. J. 574; 1. L. R. 36 All. 284.

(16) (1904) 1. L. R. 36 All. 359.

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on a recognition of the principle that dismissal of an appeal for default is not an affirmance of the decree; to the same class belong the decisions in *Patloji v. Ganu* (1); *Bholanath v. Kanti* (2); *Kailash v. Girija* (3) and *Shyam v. Satinath* (4). These decisions do not militate against or weaken the effect of the two decisions of the Judicial Committee in *Kristo Kinkur v. Burroda Caunt* (5), and *Brij v. Tejbal* (6). The decision of the Judicial Committee in *Juscurn v. Pirthichand* (7), is also clearly distinguishable. In this case, a claim was put forward for compensation on the ground of failure of consideration by cancellation of the sale. It was ruled that the right to claim compensation had accrued on the date of the cancellation of the sale, by the primary Court and that the person entitled to the compensation could not claim extension of time on the ground that an appeal had been preferred from the proceedings for reversal of the sale for there was no suspension of the right as in *Hemendra v. Dharam* (8), which followed *Surnomoyee v. Sooshee-mokhee* (9); *Prannath v. Rookea* (10), and *Nrityamoni v. Lakhani* (11).

In the case before us, the facts are entirely different. The plaintiffs seek to make final a preliminary decree in a mortgage suit. The question is, which is the preliminary decree that can be made absolute at the date of the application? In the first place, it is manifest that the only decree which is operative and can be affirmed on the date of the application is the decree of the High Court made on the 30th May 1917, and, consequently, time ran, not from the 16th July 1914, but from the 30th May 1917. The common principle which governs all the cases is that the time runs from the date of the ultimate decree which terminates the litigation and becomes, as soon as it is passed, the only operative decree between the parties, as was pointed out in *Raja Sashikanta v. Raja Sarat Chandra* (12). If a contrary view were adopted, it would be impossible to reconcile the cases on the subject. Our attention has finally been drawn to the case of *Basanta Kumar Adak v. Sm. Radha Rani Dasi* (13), which appears to be an authority for the proposition that when time is allowed by the decree of the Court of first instance for the performance of an act, the time is not

(1) (1890) I. L. R. 15. Bom. 370.

(2) (1897) I. L. R. 25 Calc. 311.

(3) (1912) I. L. R. 39 Calc. 925.

(4) (1916) I. L. R. 44 Calc. 954.

(5) (1872) 14 M. I. A. 465.

(6) (1910) L. R. 37 I. A. 70; I. L. R. 38 All. 295; 11 C. L. J. 560.

(7) (1918) I. L. R. 46 Calc. 670; 30 C. L. J. 71.

(8) (1920) 33 C. L. J. 260.

(9) (1868) 18 M. I. A. 244.

(10) (1859) 7 M. I. A. 323.

(11) (1916) I. L. R. 43 Calc. 660.

(12) (1921) 34 C. L. J. 414 (427).

(13) (1921) 26 C. W. N. 440.

extended by the dismissal of the appeal preferred against that decree. This view does not touch the question in controversy before us. But we may point out that there is much divergence of judicial opinion on the subject, as pointed out in the case of *Raja Sashi Kant v. Raja Sarat Chandra* (1). The balance of judicial opinion, is in favour of the view that when time is fixed by the Lower Court for payment of money and the decree of the Lower Court is confirmed on appeal, the time for payment runs from the date of the decree of the appellate Court though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree. We need not for the purpose of the present case, discuss whether the decisions which take the contrary view may be defended on principle.

We hold accordingly, that the view taken in *Gajadhar Singh v. Kishan Jiwan Lal* (2); *Nizamuddin v. Bohra* (3), and *Jayanti Venkayya v. Damiseti Sathi Raju* (4), is well-founded and should be adopted.

The result is, that the decree made by the Court below is affirmed and this appeal dismissed with costs.

The order for stay of sale will stand discharged.

A. T. M.

Appeal dismissed.

(1) (1921) 34 C. L. J. 414 (426).

(2) (1917) I. L. R. 39 All. 641.

(3) (1918) I. L. R. 40 All. 203.

(4) (1921) I. L. R. 44. Mad. 714.

PRIVY COUNCIL.

PRESENT: Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Carson, and Sir John Edge.

NARAIN DAS

v.

ABINASH CHANDAR AND ANOTHER.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
ALLAHABAD.]

Joint family—Lease by manager—Lease, a collateral security—Debt improvidently contracted—Lease, construction of

A lease, which is in effect a collateral security for the mortgage debt, by which an infant co-sharer's property is put into pledge to secure the repayment of

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moneys in respect of debts improvidently contracted by his father and manager, is not fair and reasonable and in proper exercise of a manager's power.

A lease must be regarded as a whole. A provision for payment of interest and any other objectionable provision in it cannot be regarded as independent bargain between the lessee and the lessor which can be cut and separated from the general structure of the lease to relieve the infant's property from these offensive provisions.

Appeal by the Defendant.

The material facts appear from their Lordships' judgment:

De Gruyther K. C. and *Wallach* for the Appellant.

Sir George Lowndes K. C. and *Brown* for the Respondents.

The judgment of their Lordships was delivered by

May, 23.

Lord Buckmaster :—Their Lordships do not desire to hear the respondents in this case, for in their opinion the principle upon which it falls to be determined is one that is plain and can be simply stated.

The appellant, Babu Narain Das, is the lessee under a lease granted to him on the 12th September, 1912, by one Babu Shekhar Chand. The lease in question affected a joint family estate that was held by Shekhar Chand and his infant son, the first respondent. Contemporaneously with the lease two other documents were executed; one was a sale of a part of the family property and the other a mortgage for Rs. 50,000, both in favour of the present appellant. The lease was an unusual document, and it certainly does some credit to the ingenuity of the pleader who drew it, for he contrived to secure that the lease should at the same time serve the purpose of a lease and a collateral security for the mortgage debt for the terms provided that out of the rent payable by the lessee under its terms the interest that was due to him upon his mortgage debt should be deducted, the result being that after all the different payments had been made as the lease provided the gross amount of Rs. 16,775 rent was reduced to Rs. 3,804 per annum.

Proceedings were subsequently instituted on behalf of the infant son to obtain partition of the joint estate, and a decree was made on the 9th November, 1914, granting this claim. The actual partition does not appear to have taken place at present. Proceedings were also instituted for the purpose of setting aside the contemporaneous mortgage and the sale, and these ended by a compromise, the effect of which was that all that the infant could reasonably claim as his share of the family estate was released from the mort-

gage debt, and the sale deeds were set aside. That compromise did not deal with the lease, which was made the subject of the subsequent proceedings out of which this appeal has arisen.

The learned Additional Judge before whom the matter first came found that the lease was one which the father could properly execute in discharge of his position as manager of the joint family estate. He examined all the rather unusual conditions of the lease with extreme minuteness, and came to the conclusion that upon the whole it was not possible for the infant to assert that the terms were so unreasonable that the lease should be set aside but in his minute examination of the actual literal contents of the document he appears to have overlooked what is the fundamental question that lies at the root of the whole of these proceedings, that is, whether the lease as it was drawn with its provisions for application of the rent, was a lease which could be regarded as fair and reasonable and in proper exercise of a manager's powers. As has already been pointed out, the lease was really in effect a collateral security for the mortgage debt, and the result was that the infant's property was put into pledge to secure the repayment of the moneys in respect of debts improvidently contracted by his father. Their Lordships think that the whole of this matter is effectively summed up in a sentence of the judgment of the High Court where they say that they regard the lease as an unfair and inequitable lease in regard to the plaintiff's rights, and that the offer put forward on behalf of the appellant that he is prepared to make all necessary alterations in the lease in order to reduce it to a proper and reasonable form, is one that cannot be considered for the purpose of influencing their judgment, and with that opinion their Lordships agree. It is impossible to do what Counsel on behalf of the appellant have ingeniously urged, to regard this provision for payment of the interest and any other provision that might be regarded as objectionable in the lease as in the nature of an independent bargain between the lessee and the lessor which can be cut out and separated from the general structure of the lease, and then can be so dealt with that the infant's property is relieved from these offensive provisions. The lease must be regarded as a whole. It must be regarded as it was drawn on the 12th September, 1913, and so regarding it their Lordships think it is impossible successfully to contend that this lease is of such a character that would justify the manager of a joint family estate binding the joint family property by means of its terms.

There only remains the consideration of one or two trivial points

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that have been raised with regard to the claim for possession, and the arrangement for payment of interest on certain sums of money to which reference will be made.

The claim for possession can be dealt with very simply. This estate has not been partitioned, though the decree for partition has been made. The decree appealed from cannot reasonably be intended as a decree to put the plaintiff into physical possession of that which still remains one undivided half of the whole. It only means that he has been excluded from his proper share of the property jointly held, and that he is entitled to possession for the purpose of securing his position.

With regard to the other matters one question is as to the sum of Rs. 1,100 paid into the Bank by the appellant consequent upon a tender that he made to the first respondent. The tender was accompanied by a condition which prevented it being a perfect and complete tender, and the respondent was under no obligation to accept it. It follows, therefore, that that cannot be regarded as the equivalent of payment, and that sum, if he is still in the control of the appellant, should be handed over to the respondent as part of the payment which he has to make. If, in fact, it is in any way in joint control so that it can be affected by an order of the Court, the Court will order that it be released and the money paid over to that respondent.

With regard to the interest upon it, there is nothing in the circumstances in which it was paid that can relieve the appellant from his liability to pay interest upon that sum. If it has earned interest that will go *pro tanto* in reducing his liability, but subject to that his liability remains.

The final question with regard to the amount of interest that has been allowed against the appellant can be disposed of in a few sentences. The rate is 12 per cent. It appears, according to our notions in this country, a high rate of interest, but that has nothing whatever to do with the matter which their Lordships have to consider. It may very well be that having regard to the local conditions in India, it is a very proper and reasonable rate to impose, and their Lordships see no reason whatever why any alteration should be made as to the amount.

It follows, therefore, that this appeal must fail, and their Lordships will humbly advise His Majesty that it be dismissed with costs.

Barrow, Rogers and Nevill : Solicitors for the Appellant.

T. L. Wilson & Co. : Solicitors for the Respondents.

A. T. M.

Appeal dismissed.

PRESENT : *Lord Buckmaster, Lord Phillimore, Sir John Edge,
Sir Lawrence Jenkins, and Lord Salvesen.*

HAFIZAN BIBI

v.

SUBA BIBI AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
ALLAHABAD]

P. C.

1922.

November, 27, 28.
December, 20.

Oral evidence—Nature of—Dower—Evidence laid after a long time.

When the evidence was laid, thirty-six years had elapsed since the date of the marriage and the verbal agreement as to the amount of dower money relied on. There was no documentary evidence, and the case rested entirely on the recollection of persons who were present at the marriage :

Held, that in such circumstances the oral evidence of an agreement must be clear and convincing in order to establish a claim against the estate of the man who was said to have been a party to it.

Appeal against the decision of the Allahabad High Court reversing that of the Subordinate Judge.

The plaintiff appellant sued for payment of Rs. 75,000 as the amount of the dower debt due by the heirs of her late husband. The other facts appear from the judgment of their Lordships.

Narasimham for the Appellant.

Montgomery K. C. and *Majid* for the Respondents.

The judgment of their Lordships was delivered by

Lord Salvesen : In this suit the appellant sued for payment of Rs. 75,000 as the amount of the dower debt due by the heirs of her late husband, Mujib Ullah. The latter died in 1909, and the present suit was commenced in April, 1912. The appellant was married about thirty-six years before the date of suit and had lived with her husband till his death. Her allegation was that at the time of the marriage an agreement was made on her behalf with her husband that her dower was to be a lakh of rupees. As she had succeeded to one-fourth of his estate the demand was correspondingly restricted.

The Subordinate Judge held on a consideration of the evidence led before him that the appellant had established her case, but his judgment was reversed by the High Court, who gave decree in favour of the appellant for three-fourths of Rs. 107, i.e. for Rs. 80-4-0, and otherwise dismissed her claim. The sum of Rs. 107 represents the so-called "fatmi" dower, or the legal minimum to

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which the widow of a Mohammedan is entitled. No question was raised as to the amount of the "fatmi" dower if this is all to which the appellant is entitled.

The issue as thus entirely one of fact, viz., whether the appellant had proved the agreement which she alleged. She adduced ten witnesses in support of her case, of whom the Subordinate Judge held two to be unreliable, but as regards the others he considered them respectable and worthy of credit. The respondents adduced six witnesses, all of whom the Subordinate Judge regarded as unreliable, and whom therefore he did not believe. Their story was that at the time of the marriage the dower was settled to be "fatimai" or "fatmi" dower.

The High Court proceeded on the assumption that the evidence for the defence was interested and unreliable, but on an examination of the evidence led on behalf of the appellant held that she had failed to prove that her dower was fixed at one lakh of rupees at the time of her marriage with Mujib Ullah. This indeed was the main issue of fact which the appellant sought to establish, although in the course of the trial a mass of conflicting statements as to the social position of the appellant's family and the customary dower of female members was elicited from the witnesses examined on both sides. The materiality of this evidence if an agreement were clearly proved is not obvious, but, on the other hand, it afforded some test of the reliability of the witnesses on whom the appellant chiefly relied if the conclusion upon it was unfavourable to her contentions.

When the evidence was led thirty-six years had elapsed since the date of the marriage and the verbal agreement relied on. There was admittedly no documentary evidence, and the appellant's case came thus to rest entirely on the recollection of persons who were present at the marriage. In such circumstances the oral evidence of an agreement must be clear and convincing in order to establish a claim against the estate of the man who is said to have been a party to it. The Judges of the High Court have pointed out numerous matters on which the appellant's witnesses gave evidence that was demonstrably false, and they accordingly reached the conclusion that their evidence in support of the allegation that the dower was fixed at one lakh was unreliable and ought to be rejected.

It would serve no good purpose to recapitulate in detail the grounds on which the High Court reached this conclusion. It will

be sufficient to indicate generally their Lordships' own conclusions on the facts in controversy.

The marriage between the appellant and Mujib Ullah was a love match. The appellant was at time a beautiful girl of eleven or twelve years, while Mujib Ullah had already reached the comparatively mature age of twenty-five. He was fond of hunting, and on one of his expeditions saw the appellant and fell in love with her. He kept the marriage a secret from his elder brother, the head of the family, but a good many of his relatives were present at it. The celebration was attended by many guests, variously estimated at 100 to 500 persons. Had the appellant been a member of her husband's family, in which the customary dower of females is proved to have been a lakh of rupees, or had she been of equal social standing, there would have been a strong probability that her people would have stipulated for a similar dower before consenting to the marriage. The truth, however, appears to have been that while her father had at one time had some interest in landed property, it had been confiscated owing to the part he had taken in the Mutiny, and both he and his sons were in very reduced circumstances. A good many of the appellant's witnesses testified to their belief that they did a considerable business (very variously estimated) in grain and as money-lenders, but they are all open to the observation that they had very inadequate means of knowledge. A striking feature of the case is that the appellant's mother and two brothers, who are all alive (the eldest brother having alone died), were not called as witnesses. On the matter of their social position, and especially as to their financial circumstances, they alone were in a position to give definite information which might have been borne out or checked by reference to accounts or other documentary evidence. No evidence was led, apart from the appellant's own statement in regard to a maternal aunt, as to what was the customary dower of females of the appellant's family. It was argued that none was available, as the appellant had no sisters and no other female relatives whom she knew. Her ignorance, however, of other members of her family is commented on by the Judges of the High Court, and certainly, if it be real, it suggests that the social importance of her family was much below that of her husband's, which is the conclusion that their Lordships have arrived at on the other evidence in the case.

Granting all this, there is no inherent improbability that the appellant's husband, infatuated as he seems to have been with her, might not have agreed to so large a dower as a lakh of rupees

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if her relatives had insisted on this as a condition of the marriage. Of any such insistence there is no trace in the evidence, and all the persons who took part in the actual celebration or in arranging the amount of her dower—the kazi, the vakil and the witnesses—are all dead. Those who give evidence in the case were merely guests who had no special interest in the matters to which they depose and whose evidence in chief is singularly bald and devoid of detail. Under cross-examination they made such divergent statements as seriously to impair their reliability. Thus, to add only one instance to the many to which the High Court Judges refer, two of the appellant's witnesses assert that Nasrat Ullah (the elder brother of the appellant's husband) was present at the marriage, although if there is one thing certain in the case it is that the marriage had been kept secret from him, as the brothers were on bad terms. On the whole, therefore, their Lordships are of opinion that the High Court reached a correct decision in holding that the appellant had failed to prove the agreement on which her claim was based, and they will humbly advise His Majesty that the appeal be dismissed with costs.

Douglas Grant; Solicitor for the Appellant.

J. Turner; Solicitor for the Respondents.

A. T. M.

Appeal dismissed.

PRESENT: *Lord Phillimore, Sir John Edge, Sir Lawrence Jenkins and Lord Salvesen.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

LAXMIBAI AND ANOTHER.

P. C.

1922.

November, 6, 7.
December, 8.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Saranjam Grant—Land or royal share of revenue—Presumption—Onus—Resumption by Government—Jurisdiction of Civil Courts—Bombay Revenue Jurisdiction Act of 1876, S. 4.

A Saranjam grant may be either of the soil and the whole revenue derived from it, or a grant of the royal share of the revenue only. There is no presumption that the grant is a grant of revenue only. The quality of original the grant

must be determined on the facts in each case: *Suryanarayana v. Patanna* (1); *Chidambara Sivaprahasa v. Veerama Reddi* (2), followed.

In the case of a Saranjam grant of the soil, the Government's right of resumption cannot be questioned in the Civil Courts. S. 4 of the Revenue Jurisdiction (Bombay) Act of 1876 militates against such jurisdiction.

Appeal from a decree of the Bombay High Court, reversing a decree of the District Judge of Dharwar.

The respondents are the descendants of one Pandurangarao, who held part of Hebli estate on a Saranjam grant made by the Government to one of his ancestors. On Panduranga's death, the Government resumed the lands and made a fresh grant of them to the 2nd defendant in the suit. The respondent No. 1 filed the suit claiming the estate. The main defence raised was that under section 4 of the Revenue Jurisdiction Act of 1876, the Civil Courts have no jurisdiction to question the resumption of the lands made by the Government. The trial Judge held that the grant was of the soil and that he had no jurisdiction to interfere with the resumption of the lands. The High Court, influenced by the view that there is a presumption that a Saranjam grant was a grant of revenue only held that the burden of proving that it was not so was on the party alleging it and reversed the decree of the trial Judge. The Secretary of State for India preferred the present appeal.

Lowndes K. C. and *Brown* for the Appellant: The decree of the High Court is wrong. There is no presumption that a Saranjam grant is a grant of revenue only. It may be a grant of the land itself as in this case. The quality of the grant has to be determined on the facts of each case: *Suryanarayana v. Patanna* (1); *Chidambara Sivaprahasa v. Veerama Reddi* (2). The plaint makes no mention of the point relied upon by the High Court that the ancestors of the plaintiff held the lands in full ownership. The only inference that can be drawn from the evidence is that the grant was a grant of the soil. When once this is found, section 4 of the Revenue Jurisdiction Act of 1876 ousts the jurisdiction of the Civil Courts to question the propriety of resumption by the Government. This was the view taken by the District Judge and it is the right view.

De Gruyther K. C. and *Parikh* for the Respondent (No. 1): The grant was a re-grant of the Saranjam by the Peshwa. It can only be a grant of the revenue only. At the time of either grant,

(1) (1918) L. R. 45 I. A. 209.

(2) (1922) L. R. 49 I. A. 286; 37 C. L. J. 199.

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the plaintiff's ancestor was in occupation of the lands. Section 4 of the Bombay Revenue Jurisdiction Act does not bar the suit in the Civil Court.

Lowndes K. G. replied.

The judgment of their Lordships was delivered by

Lord Salvesen : This is an appeal against a decree of the High Court of Judicature at Bombay, dated the 22nd December, 1916, which reversed a decree of the District Judge of Dharwar, dated the 6th January, 1913. The suit relates to a part of the Hebli estate, from which the plaintiff was evicted by the Government on the death of his grandfather, Pandurangrao. Their object in doing so was to prevent partition of what they regarded as an impartible estate held under a grant of Saranjam.

It is not necessary to recapitulate the facts which have been very fully stated in the judgment of the District Judge of Dharwar or to consider the majority of the points which were disposed of by him and on appeal by the High Court at Bombay. The sole issue which remains for determination is whether the Saranjam grant made by the British Government in favour of an ancestor of the plaintiff was a grant of the royal revenue only, or was a grant of the land itself, or of the whole revenue of the land coupled with a right to hold it. The learned District Judge held that the original grant by the British Government was a grant of the whole revenue of the land, and that this carried with it the right to make the best possible use of unoccupied land. The High Court at Bombay in reversing his decision held that the grant was one of the royal share of the revenue only and not of the soil. In reaching this conclusion it is impossible to resist the view that the judges of the High Court were much influenced by their view that there is a presumption that a grant of Saranjam is a grant of royal revenue only, and accordingly that the burden of proving that, in any particular case of Saranjam, it is a grant of the soil, lies upon the party alleging it. They relied upon various cases cited and which at that time seemed to establish this proposition. They had not, however, the benefit of two recent decisions of this Board, viz, *Suryanarayana v. Patanna* (1), and *Chidambara Sivaprakasa Pandara Sannadhigal v. Veerama Reddi* (2), in both of which it was held that there is no such presumption.

In conformity with these decisions their Lordships are of opinion

(1) (1918) L. R. 45 I. A. 203. (2) (1922) L. R. 49 I. A. 286.

that a grant of Saranjain may be either of the soil and the whole revenue derived from it, or a grant of the royal share of the revenue only. It must be determined in each case upon the facts what was the quality of the original grant, although it may well be that it is ordinarily a grant of the royal revenue only. It may be that as the plaintiff was dispossessed by the British Government in 1901 there is a certain *onus* upon the appellant to justify his dispossession, but this becomes of little materiality when evidence is adduced from which a conclusion in fact may be legitimately drawn. In the present case the oral evidence is of no value as supporting the plaintiff's case, and an inference must be drawn one way or the other from the documents that have been produced in the case. These have been examined in detail by the District Judge on pages 35 and 36 of the record, and their Lordships concur generally in the result of his analysis. It is plain that the original grant was made in respect of political services; and while it is no doubt possible that the grantees were at that time the owners of the estate, and that all that the grant was intended to give them was a release from payment of the royal share of the revenue, there is nothing in any of the documents produced which suggests such a limitation. On the contrary in one of the early documents founded on the grant was made expressly of the Kasba Hebli with its hamlets and Watanhal, with the Mahal Jukath and Mokassa "with the whole of the dues and cesses and hidden treasures, exclusive, however, of the dues of Huckdars and Inamdars," and the language of the other documents is in similar terms. It is significant also that in the deed of partition executed by Pandurangrao in 1879, the property partitioned is described as the Jahagir villages of Kasbe Hebli and Majre Watanahal and the Mouza of Talvai and Kurdapur obtained from the British Government." Throughout the documents there is no suggestion that what was conveyed was merely the royal share of the land revenue. They assume throughout that the whole revenue of the lands was conveyed to the grantees and the amount of the nazarana which has been levied from time to time appears to have been based on the yearly revenue of the estate, "there being no suggestion (as the learned District Judge says) that revenue derived by the holder as occupant, as distinct from Saranjamdar was not liable to nazarana." All these considerations are sufficient in their Lordships' opinion, to justify the inference that the original grant was a grant of the soil.

It is significant as bearing on the result at which their Lordships have arrived, that the plaintiff in his original plaint nowhere main-

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tained the view upon which the learned Judges of the High Court proceeded. His main claim was that he was a full owner of the property in dispute, and that the estate in question was granted as Sarva Inam hereditarily in recognition of the services which his ancestors had rendered in assisting the British in settling the country conquered from the Peshwas. This claim was rejected by the District Judge and has now been admitted by the plaintiff to be untenable. As an alternative to this claim, based on the grant by the British Government, the plaint proceeds as follows:—

"Saranjam grant is a grant of the Revenue only, and the Government cannot resume the Raitava rights which the plaintiff and his ancestors have been enjoying from ancient times. And even if the Saranjam grant be of the soil, Government has no right to resume it. And the estate in suit is partible."

It is not clear what is meant by "Raitava rights" but the statement sufficiently discloses that they are rights of occupancy only and not of ownership, and a claim of this kind was strenuously maintained in the Lower Court with regard to the occupation of lands which were unoccupied at the date of the original grant. This latter claim has now been abandoned. In no part of the plaint is it possible to find a claim that the Saranjam grant was a grant of the royal share of the revenue only. It appears, however, that this point was argued, and it has not been the practice of their Lordships to construe the pleadings too strictly, or to exclude a plea, which was not embodied in the plaint, from being made an issue in the case. The fact, however, that it did not occur to the plaintiff's advisers to propound this contention on the evidence which he adduced has a bearing on the question as to the proper inference to be drawn in fact from that evidence.

As the case was framed, the jurisdiction of the Civil Courts in India was apparently not ousted. But in the view which their Lordships now take, the rights of the Government to resume these lands could not be questioned in the Civil Courts.

In the result their Lordships will humbly advise His Majesty that the decree of the High Court at Bombay should be set aside and the suit dismissed with costs, here and in the Courts below.

Solicitor, India Office: Solicitor for Appellant.

E. Dalgado: Solicitor for Respondents.

K. V. L. N.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

GOPAL LALL SETT

v.

TARINEY CHAND BYSACK AND OTHERS.*

CIVIL,

1877.

May, 28.

Trustee—Decree against executors—unborn person—Shebait.

A died leaving two wives B and C, one son R, by B. and one son P. by C. The defendants were the sons of R. P had a son W, who had a daughter L. whose sons were the plaintiff and the defendant K.

C died in 1841, having dedicated to the service of certain idols properties which were the subject of the present suit. By the instrument of dedication, she appointed her grandson W to be shebait and "malik," W took out probate and possessed himself of the property left by C and died shortly thereafter, in 1842.

W left a will appointing executors. At the time of his death, his daughter L was only about a year old. By his will he directed his executor, *inter alia*, to see that the worship of the idols was carried out (as established by C) and said, "If male issue are born from the womb of my daughter such grandsons will upon attaining their ages take the whole of my property immovable and movable from my said executors but they shall in equality with my said executors only become the shebait of the said Thakooranee and the other idols, and will in the aforesaid manner perform the duties of the *sheba* or service." The will was duly proved by the executors; who possessed themselves of W's estate, including the property dedicated by C. The executors did not act as shebait, but allowed the sheba to be performed by W's step-mother S.

A suit was instituted on the 27th August, 1846 against the executors of W, who were sued as executors of W and derivative executors of C, and the descendants of A, some of whom disputed the dedication by C and claimed to be entitled to the property. The matter was referred to the Master to inquire what property C died possessed of as *stridhan*, and what portion of her estate came into the hands of W or his executors, and who would be fit and proper person to appoint, to carry out the religious trusts of C's will.

On the 15th April, 1859, the Master reported that the present defendants (sons of R) were fit and proper persons. And on the 7th June 1859 the Master's report was confirmed, and it was declared that the three defendants were fit and proper persons to execute and perform and keep up all the religious trusts in the will of C,—to receive the idols and jewels, and the balance of the rents and profits &c. And the receiver was ordered to pay the income of the property to the defendants during their natural lives or until the further order of the Court to be by

* Suit No. 560 of 1876 on the Original side of the High Court.

[See in this connection *Purna Chandra Bysack v. Gopal Lal Sett* (1908) 8 C. L. J. 369 (387—88) where the present case was referred to and the history the case set out in details.—Ed.]

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them applied in the performance of the trusts of the will of C, they undertaking to make the payments to the various persons mentioned in the decree.

The plaintiff was born on the 22nd January, 1859 and the defendant K was born on the 6th October 1856.

The present suit was instituted for a declaration that the plaintiff and the defendant K were the persons entitled to be shebait and trustees, and not the defendants, the sons of R :

Held, that L being a party to the former litigation, she and her son K were bound by the proceedings in the former litigation.

That as the plaintiff claimed under the will of W to be shebait &c and entitled to execute the trusts of C's will, and that as he was not born at the time W died, the sons of L took nothing under the will : *Tagore v. Tagore* (1).

Suit for declaration.

Mr. Branson for the Plaintiff.

Mr. Bonnerjee for the Defendants.

The following judgment was delivered by

Macpherson J.—Gobind Chand Bysack had two wives Conuck Money Dassee and Bhuggobutty Dassee.

The Defendants Tariney Chand, Mohim Chand and Nirmal Chand are the sons of Radha Kristo a son of Conuck Money.

Bhuggobutty had a son Prawn Kristo who had a son Woodoy Chund, who had a daughter Luckey Money whose sons are the plaintiff and the defendant Konnoy Lall.

So that the principal defendants are the grandsons of Gobind Chand by his wife Conuck Money and the plaintiff and the defendant Konoy Lall [whose interests are the same as the plaintiffs] are the great great grandsons of Gobind Chund by his wife Bhuggobutty.

Gobind Chand died many years ago : and his wife Bhuggobutty died in 1841, having dedicated to the service of certain Idols and the properties which are the subject of the present suit.

By the instrument of the dedication, which was also her will, she appointed her grandson Woodoy Chund to be shebait and "malik," and to be her executor ; and she directed him to perform the service of the Issoree Thakooranee "agreeing therein with" his stepmother Shiboosoondory Dassee, and as theretofore.

Woodoy Chund took out probate and possessed himself of the property left by Bhuggobutty Dassee and died shortly thereafter, in 1842:

Woodoy Chand left a will appointing Roma Nath Tagore and two others his Executors. At the time of his death, his daughter Luckey Money (whose mother had died) was only about a year old ; and he

(1) (1872) 1. A. Supp. 47 ; 9 B. L. R. 377 ; 18 W. R. 359.

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left no other child. By his will he directed his Executors to give Rs. 32 a month for the maintenance of his daughter and for her "sons and daughters" and one thousand Rupees for his daughter's marriage. He then directed the Executors to see that the worship of the Idols was carried out (as established by Bhuggobutty) and said, fourthly, "If male issue are born from the womb of my daughter such grandsons will upon attaining their ages take the whole of my property immovable and movable from my said Executors but they shall in equality with my said Executors only become the shebais of the said Thakooranee and the other Idols, and will in the aforesaid manner perform the duties of the sheva or service: and if no male issue be born from the womb of my daughter, in that case through the said Executors or those established in their stead, or persons appointed, the said sheba shall always be performed &c."

This will, which contained many bequests, was duly proved by Romanath Tagore and the other Executors, who possessed themselves of Woodoy Chund's estate, including the property dedicated by Bhuggobutty. The Executors did not act as shebais, but allowed the sheba to be performed by Woodoy Chund's step-mother Sheboosoondary, to whom they made the necessary payments.

Much litigation ensued in the Supreme Court, amongst the descendants of Gobind Chund Bysack some of whom disputed the dedication by Bhuggobutty and claimed to be entitled to the property. It commenced with a Bill filed on the 27th August 1846, against (amongst others) Romanath Tagore and the other Executors of Woodoy Chund who were sued as Executors of Woodoy Chund and derivative Executors of Bhuggobutty Dasse. The Court referred it to the Master to inquire what property Bhuggobutty died possessed of as *stridhan*, and what portion of her estate came into the hands of Woodoy Chund or of his Executors,—and as to the carrying on of the sheba, and who had carried it on since Bhuggobutty's death—and who would be a fit and proper person to appoint to carry out the religious trusts of Bhuggobutty's will.

The Master made his report in November 1857, setting out the property dedicated etc, and finding that the worship had been performed by Shiboosoondery, and that she was a fit and proper person to be appointed to execute the trusts of Bhuggobutty's will etc. In confirming this Report, the Court [by its decree of the 14th December 1857] directed the income of the estate to be paid to Shiboosoondery for the purpose of performing the worship and dividing the surplus as directed by the decree.

Shiboosoondary having died just about that time and before

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the decree was finally passed, it was referred back to the Master to find a fit and proper person or persons to perform the trusts of Bhuggobutty's will in her stead.

Upon the 15th of April 1859, the Master reported that the three defendants, Tariney, Mohini, and Nirmal as the grandsons of Gobind Chund were fit and proper persons. And on the 7th June 1859, the Master's Report was confirmed, and it was declared that these three defendants were fit and proper persons to execute and perform and keep up all the religious trusts in the will of Bhuggobutty Dasee,—to receive the Idols and jewels, and the balance of the rents and profits etc. And the Receiver was ordered to pay the income of the property to Tariney, Mohini and Nirmal monthly during their natural lives or until the further order of the Court to be by them applied in the performance of the trusts of the will of Bhuggobutty Dasee, they undertaking to make (out of the surplus) the payments to the various persons in the decree of the 14th December, 1857, mentioned.

The Executors of Woodoy Chund carried out the directions given by this decree, and were discharged: and the defendants Tariney, Mohini and Nirmal have ever since received the income and have in fact enjoyed the property subject to carrying out the directions of the decree.

The Defendant Konoy Lall was born on the 6th of October 1836, and the plaintiff was born on the 22nd of January 1859.

The object of the present suit is to reopen all these old proceedings and to have it declared that the plaintiff and the defendant Konoy Lall are the persons entitled to be *shabaitis* and Trustees, and not the defendants Tariney, Mohini and Nirmal.

It seems to me that the plaintiff has no good cause of action.

His mother Luckeymoney was a party to the old litigation and is bound by the proceedings in it so also apparently is the defendant Konoy Lall. And it may be doubted whether the interests of the plaintiff himself (even on his own view of his position under the will of Woodoy Chund) were not sufficiently represented then, notwithstanding that he was born six months before the final decree in June 1839.

However that may be, it is under the will of Woodoy Chund that the plaintiff claims to be *shabaitis* &c, and entitled to execute the trusts of the Bhuggobutty's will. But he was not born, nor was Konoy Lall born, at the time Woodoy Chund died: and their mother Luckeymoney was then only a year old. These being the circumstances, it is clear that under the recent decisions on this question

[in *Tagore v. Tagore* (1), and other cases] I must hold that the plaintiff and Konoy Lall the sons of Luckeymoney took nothing under the will of Woodoy Chund. But if they do not take under Woodoy Chand's will his daughter Luckeymoney is his heiress and takes his Estate, standing between her sons and the succession. This is fatal to the plaintiff's right of suit. It is stated that Luckeymoney is ready to execute a deed of relinquishment in favour of her sons. But it is too late to think of that at the hearing or settlement of issues. As the case has been laid before the Court the plaintiff is certainly not entitled to sue. Therefore it is unnecessary to proceed further with the suit which accordingly is dismissed with costs &c.

Trotman and watkins : Solicitor for the Plaintiff.

Ramsfry & Rogers : Solicitors for the Defendants.

A. T. M.

Suit dismissed.

(1) (1872) 1. A. Supp. 47 ; 9 B. L. R. 377 ; 18 W. R. 359.

APPELLATE CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Chotzner.*

GORA CHAND HALDAR AND ANOTHER

v.

RAKHAL CHANDRA GHOSE AND OTHERS.*

Rent, commutation of—Bengal Tenancy Act (VIII of 1885), Sec. 40—Notice, if to be served—Notice, non-service of, effect of—Order of Revenue Officer, without jurisdiction, effect on civil Court.

No order for commutation of rent under section 40 of the Bengal Tenancy Act is to be made till notice of the application has been served. An order made without service of notice, is *ultra vires*.

An order under section 40 of the Bengal Tenancy Act, made by Revenue Officer without jurisdiction does not bind the civil Court: *Jadu v. Pran Krishna* (1).

Appeal by the Plaintiffs.

Suit for recovery of arrears of rent.

* Appeal from Appellate Decree No. 934 of 1920, against the decree of P. C. De, Esq., District Judge of Birbhum, dated the 13th November, 1919, reversing that of Babu Nisikanta Guha, Munsiff of Rampurhat, dated the 14th February, 1919.

(1) (1917) 1. L. R. 45 Calc. 769.

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Gopal

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Gora Chand

Rakhal.

The material facts appear from the judgment.

Babu Mohes Chandra Banerjee (for Babu Pramatho Nath Bandopadhyaya) for the Appellants.

Babus Brojo Lal Chakrabutty, Khatris Chandra Chakrabutty and Panchanan Ghosal for the Respondents.

The judgment of the Court was delivered by

May, 17.

Mookerjee J :— This is an appeal by the plaintiffs in a suit for recovery of arrears of rent on the allegation that the rent is payable in kind. The tenant defendants urged that rent was payable not in kind but in cash, and in support of this contention they relied upon a mutation order, made by an Assistant Settlement Officer on the 17th July 1912, and amended on the 2nd September 1912. The plaintiffs thereupon assailed the validity of the mutation order on a variety of grounds. The Court of first instance came to the conclusion that the order was *ultra vires* and afforded no defence to the claim. Upon appeal the District Judge has held that rent has been validly commuted by an order under section 40 of the Bengal Tenancy Act, which cannot be successfully impeached by the appellants. On the present appeal, we are invited to consider which of these conflicting views is correct.

It is plain from the materials on the record that no notice of the application for commutation was served upon the plaintiffs who are some of the landlords of the tenant defendants. The plaintiffs contend accordingly that the mutation order is not operative as against them. Section 40 sub-section (2) provides that an application may be made to one of the revenue authorities mentioned therein for commutation. In the present case, such an application was made by the tenants. Although the section does not state explicitly that no order for commutation is to be made till opportunity has been afforded to the party liable to be affected thereby to appear and contest the application, it is obvious on first principles that no order should be made till notice of the application has been served. The object of the application for commutation is to secure an alteration of the most essential element of the tenancy, namely, the rent. It is of the utmost importance to the parties whether the rent is to be payable in kind or in cash; and if the rent is to be paid in cash what sum should be taken as the proper amount payable in lieu of rent previously paid in kind. An order of this description cannot justly be made without notice to the party affected. We must consequently hold that the order was made without jurisdiction. This is not a case where proceed-

ings properly initiated have been notified to the parties concerned, but there has been an irregularity in the service of notice. Here the revenue authorities assumed jurisdiction over persons who would be affected by their order without any notice served upon them. In such circumstances, the order must be regarded as *ultra vires*. As was observed by Willes J. in *Cooper v. Wandsworth* (1), "a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; that rule is of universal application and founded upon the plainest principles of justice." There can be no dispute that an order under section 40, made by a revenue officer without jurisdiction, does not bind the civil Court, see *Jadu Nath Manna v. Prankrishna Das* (2).

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the lower appellate Court.

A. T. M.

Appeal allowed.

(1) (1863) 14 C. B. N. S. 180 (190).

(2) (1917) 1. L. R. 45 Calc. 769.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Chotzner.

FAIZUDDIN AND OTHERS.

v.

ASRAB ALI AND OTHERS.*

Registration—Lease, if for a term of year or not—Test—Option to continue the lease—Registration Act (XVI of 1908), Sec. 17 (d).

In the determination of the question whether a lease is for a term of year or not, the test to be applied is, whether there is a present demise for a year only or for a period of more than one year.

Where there is no demise for a longer period than one year, the fact that the tenant has the option at the end of the term of one year to continue his tenancy does not make the lease a lease for a longer term than one year.

* Appeal from Appellate Decree No. 893 of 1920, against the decree of O. M. Martin Esq, District Judge of Tipperah, dated the 2nd January, 1920, reversing that of Babu Annada Prosad Majumdar, Munsif of Comilla, dated the 15th February, 1919.

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Asrab Ali.

Mookerjee, J.

Clause (d) of section 17 of the Registration Act applies when the lease is for a term longer than one year : *Jugdesh v. Abedollah* (1).

Appeal by the Plaintiffs.

Suit for recovery of possession of land.

The material facts appear from the judgment.

Babu Hemendra Kumar Das for the Appellants.

Babus Baranasibasi Mukherjee and *Sasadhar Roy (I)* for the Respondents.

The judgment of the Court was delivered by

May, 17.

Mookerjee, J:—This is an appeal by the plaintiffs in a suit for recovery of possession of land on declaration of title. The trial Court decreed the suit. On appeal that Judgment was reversed. On second appeal to this Court the case was remanded to the lower appellate Court for reconsideration. After remand, the District Judge adhered to the opinion previously expressed by him, with the result that the suit has been dismissed. On the present appeal, the plaintiffs have contended that the decision of the District Judge is erroneous, as he has excluded from consideration a lease granted on the 7th April 1883 on the ground that the document, though compulsorily registrable under section 17 of the Indian Registration Act, had not been duly registered. Section 17 provides that a lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent shall be compulsorily registrable. The question for consideration, consequently, is, whether the document now before us is a lease from year to year or for a term exceeding one year or reserves a yearly rent. The lease purports on the face of it to be a settlement for a term of one year. The lease states that the tenant had presented himself, that he had prayed for a settlement for the year 1290 for a term of one year, and that the lease was accordingly granted on condition that an annual rent of Rs. 6 would be paid. The document then proceeds as follows : " If you do not pay the rent, year by year, at the expiry of the term, we will settle the jote elsewhere or bring the lands in our possession. To this you will not be able to make any objections. You will not get credit for any rent which is paid, without obtaining a receipt, and even after the expiry of the term of this pottah, if you pay to us, year by year, the settled rent, year by year, without objection, we will not settle the said lands elsewhere. To this effect we give you settlement by this *anumati pattah* for the year 1290 B. S. for a term of one year."

(1) (1870) 14 W. R. 68.

It will be observed that the document is described as a settlement for a term of one year in at least three places. But it is argued on behalf of the respondent that if all the terms of the lease are examined, it will be found that the lease was for more than a year. The test to be applied is, whether there was a present demise for a year only, or for a period of more than one year. The application of this test leads to a conclusion unfavourable to the respondent. If there is a present demise for more than a year, the legal consequence follows that the tenant has not the option to vacate the land at the end of a year. If from the inception of the tenancy, he is a tenant from year to year, he must terminate the tenancy by an appropriate notice. On the other hand, the lease makes it abundantly clear that the tenant was allowed the option to quit the land without any notice at the end of the term of one year. He had the option to continue in occupation of the land upon payment of rent and if he chose to exercise that option his possession thereafter would be not that of a tenant for one year but of a tenant from year to year. This is exactly what happened in the case of *Boyd v. Kreis* (1), where Trowleyan J. held that the mere fact that the tenant had the option to review the period for which the lease was to run did not make the tenancy a tenancy in excess of one year. This accords with the decision in *Hand v. Hall* (2), which shows that the existence of the option does not create a lease for a term exceeding one year. A similar view has been adopted in the cases of *Khayali v. Hussain Bakhsh* (3), and *Apu Budgavda v. Narhari Annajee* (4). The decision in *Bhobani Mahto v. Shib Nath Para* (5) is clearly distinguishable; Although the lease in that case purported to be a lease only for a year, there was a covenant that the usufructuary mortgagee would continue till the loan was repaid. Upon a consideration of all terms of the lease the Court held that the lease was for a period longer than a year. A similar remark applies to the decision in *Venkatachellam Chetti v. Andian* (6). There also although the lease purported to be a settlement for a year, there was a covenant that the tenancy would continue until another document was executed, and the Court found that the deed taken as a whole created a tenancy for a longer period than one year.

We are of opinion that in the present case there was no demise for a longer period than one year and that although the tenant had the option at the end of the term of one year to continue his

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(1) (1890) I. L. R. 17 Calc. 548.

(2) (1877) L. R. 2 Ex. D. 355.

(3) (1886) I. L. R. 8 All. 198.

(4) (1878) I. L. R. 3 Bom. 21.

(5) (1886) I. L. R. 13 Calc. 113.

(6) (1881) I. L. R. 3 Mad. 358.

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tenancy, that did not make the lease a lease for a longer term than one year. From this point of view it must be held that the document was not compulsorily registrable.

It has next been contended that the lease reserves a yearly rent. It is plain, however, that this cannot be treated as a lease reserving a yearly rent, inasmuch as there was a present demise for one year. Clause (d) of section 17 of the Indian Registration Act applies when the lease is for a term longer than one year. This position is supported by the decision in *Jugdesh Chunder Biswas v. Abedol-lah* (1). The decision in *Mohunto Sontho Prosad Das v. Parasu Padhan* (2), mentioned on behalf of the appellants is clearly distinguishable.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him for reconsideration. The lease will be treated as part of the evidence, provided its genuineness is established. The District Judge will then consider whether the boundaries given in this document advance the case of the plaintiffs. Costs will abide the result.

A. T. M.

Appeal allowed: Case remanded.

(1) (1870) 14 W. R. 68. (2) (1876) 26 W. R. 98.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Chotzner.*

KEDAR NATH SADHUKHAN AND OTHERS

v.

MADHU SUDAN DAS AND OTHERS.*

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May, 18, 19.

Ejectment—Permanent tenancy—Long possession and uniform payment of rent—Transfer of Property Act (IV of 1882), Sec. 106—Or—Notice, service of—Service on head member of joint family.

Mere long possession and uniform payment of rent are not by themselves sufficient to make a tenant a permanent one. The material elements are—the land had been let out for purposes of residence, that it had been so occupied, that there

* Appeal from Appellate Decree No. 2083 of 1920, against the decree of Babu Banwari Lal Banerjee, Subordinate Judge of Howrah, dated the 21st June, 1920, reversing that of Babu Kumud Nath Ray, Munsif of Howrah, dated the 22nd January, 1919.

had been instances of transfer and succession, and that structures were erected on the land.

The land was in occupation of two sets of tenants and notice to quit under section 106 of the Transfer of Property Act was served on the respective heads of two joint families :

Held, that the service was sufficient, notwithstanding that there was no proof of prior tender or delivery to each of the joint tenants personally.

The word 'or' is an alternative word : *Elliott v. Turner* (1). It is not always disjunctive, and is sometimes interpretative or expository of the preceding word : *Hills v. London Gas Co* (2).

In section 106 of the Transfer of Property Act, the legislature uses the expression "If such tender or delivery is not practicable" in one contingency, namely, when service is effected by fixing the notice to a conspicuous part of the property.

Appeal by the Defendants.

Suit for ejectment.

The material facts appear from the judgment.

Babus Dwarka Nath Chuckerbuly, Gunada Charan Sen and Prasanta Bhushan Sen for the Appellants.

Babus Ram Chandra Masumdar and Nagendra Nath Ghose for the Respondents.

The judgment of the Court was delivered by

Mookerjee J. This in appeal by the defendants in a suit for ejectment. The case for the plaintiffs was, that the defendants held as tenants and that their tenancy which was of a terminable character had been duly terminated by the service of notice to quit. The Court of first instance held that the tenancy was permanent and dismissed the suit. Upon appeal the subordinate Judge has held that the tenancy was terminable and had been duly terminated before the institution of this suit. On the present appeal, the conclusion of the Subordinate Judge upon each of the two points in controversy has been assailed on behalf of the appellant.

As regards the nature of the tenancy the Subordinate Judge has found that the tenants have been in occupation for more than 40 years, and that during this period the rent has been paid at a uniform rate. The Subordinate Judge, however, has held that long possession and uniform payment of rent are not by themselves sufficient to justify the finding that the tenancy was permanent from its inception. We are of opinion that the view taken by the Subordinate Judge is well-founded.

(1) (1845) 2 C. B. 446.

(2) (1860) 5 H. & N. 312.

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Our attention has been drawn to the decision in *Shoroshi Charan Ghose v. Bhagloo Sah* (1), as also to the judgment of the Judicial Committee in *Surendra Nath Roy v. Dwarka Nath Chakravarty* (2) Neither of these cases is of real assistance to the appellant. We have not in the present case the very material elements which existed in the decisions to which our attention has been invited, namely, that the land had been let out for purposes of residence, that it had been so occupied, that there had been instances of transfer and succession, and finally, that structures had been erected on the land. In these circumstances it is impossible for us to hold that the view taken by the Subordinate Judge as to the terminable character of the tenancy is erroneous in law.

As regards the second point, the Subordinate Judge has found that the notice to quit was duly served. The correctness of his conclusion upon this point must be tested by a reference to the provisions of section 106 T. P. Act which governs this case. The second paragraph of that section provides that every notice under this section must be in writing, signed by or on behalf of the persons giving it, and tendered or delivered either personally to the party who is intended to be bound by it or to one of his family or servants at his residence or (if such tender or delivery is not practicable), affixed to a conspicuous part of the property. In the case before us, the land was in the occupation of two sets of respondents—the Sadhukhans and the Bags. The subordinate Judge has held on the evidence that the notices were duly served, because they were delivered to Kedar Nath Sadhukhan and Nagendra Nath Bag who were the respective heads of the two joint families. The appellants have contended, however, that even if these findings are accepted as correct, the fact of such delivery only raises the rebuttable presumption that the notices had reached the other joint tenants. In support of this proposition, reliance has been placed upon a passage from the judgment by the Judicial Committee in the case of *Harihar Bannerji v. Kamsashi Roy* (3) where Lord Atkinson states that in case of joint tenants, each intended to be bound, and that it has long ago been decided that service of a notice to quit upon one joint tenant is *prima facie* evidence that it has reached the other joint tenants. Reference is then made to the cases of *Macasbuey v. Crich* (4); *Doe v. Watkins* (5), and *Solton v. Kelly* (6).

(1) (1920) 32 C. L. J. 85.

(2) (1919) 24 C. W. N. 1.

(3) (1918) 1 L. R. 46 Calc. 458 (480); 29 C. L. J. 117.

(4) (1805) 5 Esp. 196; 8 R. R. 770.

(5) (1806) 7 East 551; 8 R. R. 670.

(6) 6 Ir. C. L. R. 367.

An examination of the judgment in these cases shows that service on one of several joint tenants is *prima facie* sufficient for all, and that it has similarly been held that service on a corporation may be effected by a service on one of its officers: *Doe v. Woodman* (1). The case before us, however, is, as we have stated, governed by the provisions of section 106 of the Transfer of Property Act, which lays down a precise and definite rule for the service of the notice to quit required by that section. Such notice must be tendered or delivered either personally to the party intended to be bound by it or to one of his family or servants at his residence or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property. The appellant felt pressed by this provision and had to abandon the contention that tender or delivery to a member of the family is not sufficient, unless an attempt has been made to tender or deliver the notice personally to the party intended to be bound thereby. It is remarkable, however, that a very different set of rules has been prescribed by the Legislature for the service of summons in suits and other judicial proceedings as is clear from an examination of the provisions of Order 5 of the Civil Procedure Code of 1908. Under that order substituted service is permissible, only when an attempt to effect personal service has failed. Here, however, the plain language of section 106 indicates that service may be effected in one or other of the modes prescribed. The appellant has thus been driven to contend that the term 'or' means—'or if, such personal tender or delivery is impossible'. There are two manifest objections to this interpretation. In the first place, the word 'or' is an alternative word, as was observed by Parke B. in *Elliot v. Turner* (2). It is, however, not always disjunctive and is sometimes interpretative or expository of the preceding word: *Hills v. London Gas Co.* (3). But, no instances have been brought to our notice where the term 'or' is used neither as alternative nor as synonymous. In the second place, in section 106, the Legislature uses the expression "if such tender or delivery, is not practicable," in one contingency, namely, when service is effected by fixing the notice to a conspicuous part of the property. If the Legislature had intended that the mode previously mentioned should not be alternative but that recourse should be permissible to one of the modes only when the other had proved infructuous, the legislature could easily have framed the section in suitable terms. We are consequently of opinion that in

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Mookerjee, J.

(1) (1807) 8 East 228; 9 R. R. 422.

(2) (1845) 2 C. B. 446.

(3) (1860) 5 H & N. 312.

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the case before us, where there was a tender or delivery of the notice to the head member of the family, the service was sufficient, notwithstanding that there is no proof of prior tender or delivery to each of the joint tenants personally. We hold accordingly that the Subordinate Judge has correctly found that the notice was duly served.

The conclusion follows that the tenancy was terminable and has been legally terminated. The decree of the Court below is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed,

Before Sir Asutosh Mookerjee, Knight Judge, and Mr. Justice Chotsner.

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April, 12.

RAMKAMAI BANIK SAHA

v.

SYAM SUNDAR BANIK SAHA.*

Limitation—Limitation Act IX of 1908) Sch. I. Art. 120—Suit for construction of will—Time, when runs—Specific Relief Act (I of 1877), Sec. 42 Proviso—Further relief—Declaratory suit.

A suit for construction of a will is governed by article 120 schedule I of the Limitation Act, and the right to sue does not accrue from the death of the testator or the date of the probate of the will: *Chukkun v. Lolit* (1). So long at least as the estate is in the hands of the executor and the administration has not been completed, the right to obtain construction of the will is a continuing right.

A suit for a declaratory decree should not be dismissed on the ground that it is barred by the proviso to section 42 of the Specific Relief Act, unless it is quite clear that the plaintiff should seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for. The proviso to section 42 forbids a suit for a pure declaration without further relief, but it does not compel a plaintiff to sue for all the reliefs which could possibly be granted or debar him from obtaining a relief which he wants, unless at the same time he asks for a relief which he does not want.

Appeal by the Plaintiff.

*Appeal from Original Decree No. 61 of 1921, against the decision of Mouly Osman Ali, Subordinate Judge of Dacca, dated the 6th December, 1920.

(1) (1893) 1. L. R. 20 Calc. 906.

Suit for construction of a will.

The material facts appear from the judgment.

Babus Rupendia Kumar Mitter, Navadwip Chandra Saha and Rama Prosad Mookerjee for the Appellant.

Dr. Sarat Chandra Basak, Babus Kanai Lal Saha and Pramotha Nath Bandopadhyaya for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This appeal is directed against a decree of dismissal made in a suit for construction of a will. One Krishna Prosad Saha Banik, the father of the plaintiffs and the first defendant made a testamentary disposition of his properties on the 30th April, 1897. Probate was taken by the executors on the 13th September, 1897. The present suit was instituted on the 15th August 1919 for construction of the will and for a declaration that the testator had died intestate with regard to all his properties except what he had specifically bequeathed to his widow and that the plaintiffs had thereupon become entitled to two-thirds share of the estate left by their father by right of inheritance. The suit was defended on a variety of grounds which need not be enumerated for our present purpose. It is sufficient to state that the suit has been dismissed as barred by limitation. The subordinate Judge has held that right to sue for declaration that the father of the plaintiffs had died intestate and that they had thereupon taken shares as heirs to the properties left by him, must be deemed to have arisen from the time when the first defendant the surviving executor, put in an application for probate of the will or at the latest when the will was proved.

The point in controversy in the present appeal is whether this view of the law is well-founded. The plaintiffs have not disputed that the period of limitation applicable is that provided in Art. 120 of the second schedule to the Indian Limitation Act which provides that a suit for which no period of limitation is provided elsewhere in the schedule must be instituted within 6 years from the date when the right to sue accrues. The defendant also has invoked the aid of the article; but the parties are not agreed as to the interpretation of the provision in the third column namely, what is the point of time when the right to sue accrues in cases of this description where the plaintiff seeks to have construction of a will. The question appears to have been considered by this Court in the case of *Chukkur Lal Roy v. Lolit Mohan Roy* (1). In that case, a suit was instituted for the construction of a will alleged to

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have been executed by Saroda Prosad Roy on the 17th September 1865. A codicil was added on 18th March 1868 just before the death of the testator. As the will had been executed before the Hindu wills Act came into operation no application for probate was made. The suit for construction was commenced on the 13th February 1889. The plaintiff prayed as follows : namely, first that the will and codicil of the late Saroda Pershad Roy be construed and the rights and interests of Lalit Mohun and of all other parties, if any, respectively, under the will be declared ; secondly that, subject to such dispositions as may be determined by the Court to have been validly made by the will, the rights and interests of the plaintiffs as heirs to the estate of Saroda Prosad Roy, deceased, under the Mitakshara law of inheritance, may be declared ; and, thirdly, that all necessary declarations and directions may be made and such reliefs may be granted as under the circumstances of the case, may be fit. The suit was defended on the ground, amongst others, that the claim was barred by limitation. Thereupon the third issue was raised in the following terms : Is the suit barred by limitation. The District Judge discussed the question in the following terms : " Regarding the suit as one for a declaration the question of limitation is not so easy to decide, for I find no provision in the Act expressly referring to suits of this kind generally, though there are provisions respecting some particular kinds of such suits. Art. 120 of the second schedule is the only one which seems to apply. This provides a limitation of six years from the date when the right to sue accrues, for all suits for which no period of limitation is provided elsewhere in this schedule. The question then is, when the right to sue accrued." For the solution of this question, the District Judge relied upon the judgment of Sir Richard Garth C. J. in the case of *Kristomoni Dasi v. Nripendra Krishna* (1). Where the Chief Justice had made the following observation : " In my opinion, under section 42, specific Relief Act, a person who is entitled to any right to property may, as a rule, institute a suit against any other person for a declaratory decree on any occasion when by word or deed, such other person may deny his right within the meaning of that section. There is therefore in the present case a recurrent cause of action on every refusal or neglect to pay over the surplus profits of the estate. Not only section 23 but also section 10 of the Limitation Act applies to the case and the suit is in my opinion not barred as regards any

(1) R. A. 29 & 30 of 1884, unreported.

part of the relief sought." The District Judge then proceeded to construe the will, and his decree embodied a declaration as to the effect of the provisions contained in the testament. An appeal was next preferred to this Court. Mr. Woodroffe who appeared on behalf of the respondent contended that the view taken by the District Judge upon the question of limitation was not correct. He formulated his argument in the following terms. "As to limitation, I say six years from the death of the testator is allowed. Art. 141 does not interfere with this, as I have the estate against the heiress. My estate was adverse to her when I kept her out. I have held for myself from the death of Saroda; and if the will does not give me an interest, I have been in possession for more than 20 years before suit." In reply, Mr. Charles Paul argued that as to limitation the suit was one for construction of a will, and the cause of action did not arise when the widow was alive; the plaintiffs asked for a declaration and for an account. Mr. Justice Ghose who delivered the judgment of the Court overruled the contention that the suit was barred by limitation and observed as follows: "The suit is not for possession but for construction of the will and codicil, and for a declaration of the plaintiffs' rights, as heirs to Saroda Prosad. Except in the few cases especially provided for in the Limitation Act (e. g. a suit to obtain a declaration that an adoption is invalid, or that an alienation by a widow is not binding on a reversioner) a suit for a declaratory relief of this nature cannot be held to be barred, so long as the right to the property, in respect of which the declaration is sought, is a subsisting right. So long as the widow was alive, the plaintiff's right as reversionary heirs was a subsisting right. The right to bring a suit to construe the will and codicil and for a declaration of the plaintiffs' right, is a continuing right and may be claimed within the statutory period (whether it be 12 years or 6 years under Art. 120) from the time when the plaintiffs become entitled to possession or other consequential relief. This suit having been instituted within six years is amply within time." The Court then proceeded to construe the provisions of the will and adopted a construction contrary to that which had found favour with the District Judge. The matter was next taken on appeal to the Judicial Committee; *Lalit Mohun Singh Roy v. Chukken Lal Roy* (1). The question of limitation does not appear to have been argued, although it was the interest of the respondent to support the judgment of the High Court on that ground. The judgment delivered by Lord Davey deals

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with the question of construction and the view adopted by the Judicial Committee was that the construction adopted by the High Court could not be supported. The Judicial Committee accordingly proceeded to restore the decree of the District Court with a slight variation. It is inconceivable that the Judicial Committee should have considered the case on the merits, if the suit was obviously barred by limitation. We are consequently of opinion that the decision of this Court in *Chukku Lal v. Lolit Mohun Roy* (1), is an authority for the proposition that a suit for construction of a will is Governed by Art 120 of the schedule to the Limitation Act, but that the right to sue does not accrue from the death of the testator or the date of the probate of the will. The case clearly shows that so long at least as the estate is in the hands of the executor and the administration has not been completed; the right to obtain construction of the will is a continuing right.

This view appears to have been recognised impliedly in numerous cases of construction of will to be found in the reports. Reference may be made to the case of the will of Hari Das Dutt which was executed on the date of the death of the testator, the 30th October 1875. The probate was taken out on the 20th December 1875. The suit for construction was instituted on the 19th December, 1904. There was no suggestion that the suit for construction was barred by limitation. The case was heard in the first instance by Woodroffe, J, then by a Special Bench and ultimately by the Judicial Committee. The judgments will be founded reported in *Radha Prasad Mullick v. Ranee Mani Dussee* (2), *Radha Prasad v. Ranee Mani* (3). Although the suit had been instituted after the lapse of nearly 30 years from the death of the testator, some of the questions of construction had to be reserved and were reserved, following the precedent of the Judicial Committee in *Lalit Mohun v. Chukken Lal* (4). The result was that there was another litigation for construction of the will, for the determination of one of the questions which had been left open. (See the cases of *Radha Prasad v. Rani Mani* (5) and *Rani Mani v. Radha Prasad* (6). It is worthy of notice that even in this last judgment, another possible question of construction has been left open and may give rise to a further litigation. Reference may also be made to the case of

(1) (1893) I. L. R. 20 Calc. 906.

(2) (1906) I. L. R. 33 Calc. 947; 3 C. L. J. 502.

(3) (1908) I. L. R. 35 Calc. 896; 8 C. L. J. 48.

(4) (1897) I. L. R. 24. Calc. 834.

(5) (1910) I. L. R. 38 Calc. 188; 13 C. L. J. 183.

(6) (1914) I. L. R. 41 Calc. 1907; 20 C. L. J. 348.

Purna Chandra Bysack v. Gopal Lal Sett (1), which arose out of a suit instituted in 1904 for the construction of a will executed on the 29th May, 1841. It was not suggested before this Court or the Judicial Committee, *Gopal Lal v. Purna Chandra* (2), that the suit was barred by limitation. Reference may again be made to the cases of *Jehangir Dadabhoy v. Kai Khusru Kavasha* (3) and *Kai Khusru Bessonji v. Shirinbai* (4), where the suits for construction of wills would have been obviously barred by limitation, if the view adopted by the Subordinate Judge in this case and urged by the respondent had been the law.

The view we take is in no way inconsistent with the decision of this Court in *Mohabharat Saha v. Abdul Hamid Khan* (5) where reference is made to the decision in *Chukkun Lal v. Lolit Mohan* (6). On the other hand, it is in agreement with the view adopted by Chatterjee and Richardson JJ. in *Tarak Nath v. Syama Charan* (7). We are consequently of opinion that the suit should not have been dismissed as barred by limitation on the ground that the suit had been instituted after the lapse of more than 6 years from the death of the testator or the application for grant of probate or the issue of probate. The plaintiff contends that the administration of the estate has not yet been completed. The first defendant, the surviving executor, also urged in his written statement that the administration of the estate has not yet come to an end. In such circumstances, it is plain that the questions of construction may arise and may require decision, if for no other purpose, at least for the purpose of guiding the executor in the discharge of his duties.

It is now necessary to consider two further points. In the first place, an objection was taken in the Court below that the necessary parties are not before the Court. No opportunity was allowed to the plaintiffs to bring such parties before the Court. The plaintiffs have offered to add as defendants all persons who are likely to be interested in or affected by the determination of the question of construction of the will. This will accordingly be done as soon as the record reaches the Court below.

In the second place, it was suggested that the suit could not be maintained as a suit for declaration without consequential relief in view of the provisions of section 42 of the Specific Relief Act. We

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(1) (1907-8) 8 C. L. J. 369.

(2) (1921) L. R. 49 I. A. 100; 36 C. L. J. 57.

(3) (1914) I. R. 42 I. A. 71; I. L. R. 39 Bom. 296.

(4) (1918) L. R. 45 I. A. 257; I. L. R. 43 Bom. 88.

(5) (1904) 1 C. L. J. 73.

(6) (1893) I. L. R. 20 Calc. 906.

(7) (1916) 36 I. C. 292.

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are of opinion that there is no force in this contention. The true effect of section 42 was explained by this Court in *Joy Narain Sen Ukil v. Sri Kantha Roy* (1). The expression used by the Legislature is not "other relief" but "further relief." A suit for a declaratory decree should not be dismissed on the ground that it is barred by the proviso to section 42 of the Specific Relief Act, unless it is quite clear that the plaintiff should seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for. The proviso to section 42 forbids a suit for a pure declaration without further relief, but it does not compel a plaintiff to sue for all the reliefs which could possibly be granted or debar him from obtaining a relief which he wants, unless at the same time he asks for a relief which he does not want. In the present case, it is impossible for us to say that the plaintiffs at the present time, required any relief other than the construction of the will. If the plaintiffs are not successful in maintaining their view of the legal effect of the provisions of the will, no further question arises. If they are successful, it would be for them to determine what relief, if any, they should seek on the basis of the construction which may ultimately be adopted by the Court. If they are successful in this litigation and thereafter institute a suit for further relief, such questions as may arise will be decided, including the question of limitation in relation to any possible claim for administration, accounts or possession. It is to be distinctly understood that if the plaintiffs succeed in maintaining their view of the legal effect of the will, there will be no declaration in the decree to the effect that they had a subsisting title at the date of the commencement of this litigation. The sole question for decision is, what is the legal effect of the provisions made by the testator in his will. Such construction cannot prejudice the determination of other controversies which may arise between the parties in future,

The result is that this appeal is allowed the decree of the Subordinate Judge set aside and the case remanded to him for construction of the will.

The appellants are entitled to their costs of this Court. The costs in the Court below will abide the result of the trial of the suit.

A. T. M.

Appeal allowed.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Chotzner.

JANAKI BALLAV ROY AND OTHERS

v.

ENIAT MANDAL.*

CIVIL

1922.

May, 16.

Rent—Enhancement—Enhanced rent not paid immediately preceding the period for which rent claimed—Bengal Tenancy Act (VIII of 1885,) Sec. 9 cl (a) Proviso and Sec. 50—Rent enhanced not in writing registered.

The true effect of section 29 of the Bengal Tenancy Act is that there is no permanent enhancement when there is an attempt to increase rent without writing registered. The legislature allows the landlord to realise rent at the increased rate when the rent at that rate has been actually paid for a continuous period of not less than three years immediately preceding the period for which rent is claimed.

Enhanced rent was actually paid from 1314 to 1319 but not in 1320. The rent was not enhanced by writing registered. A suit was brought claiming rent at enhanced rate for 1321 to 1324.

Held, that the plaintiff was not entitled to claim rent at enhanced rate.

Section 50 of the Bengal Tenancy Act contemplates a case where a tenancy has been *held*, at a certain rate; section 29 to a case where rent has been actually *paid* for a period of three years.

Appeal by the Plaintiffs.

Suit for increased rent of Rs. 2-5-6 gds in addition to the pre-existing rent of Rs. 18-11-12 gds.

The material facts appear from the judgment.

Babu D. N. Bagchi for the Appellants.

Dr. Dwarka Nath Mitter, Babus Bireswar Bagchi and Narayan Chandra Kar for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—The only substantial question argued in this appeal is, whether the Subordinate Judge has rightly dismissed the claim for the increased rent of Rs. 2-5-6 gds. claimed by the plaintiff in addition to the pre-existing rent of Rs. 18-11-12 gds. It is conceded that the rent was not enhanced by writing registered as required by clause (a) of section 29 of the Bengal Tenancy Act. Consequently, the plaintiffs are driven to rely upon the first clause to the proviso which runs as follows: "Nothing in clause (a) shall prevent a landlord from recovering rent at the rate at which it has been

May, 16.

*Appeal from Appellate Decree No. 1171 of 1920, against the decree of Babu Satis Chandra Basu, Additional Subordinate Judge of Rajshahi, dated the 14th February, 1920, modifying that of Babu Kiran Chandra Mittra, Munsif of Malda, dated the 3rd February, 1919.

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actually paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed." This proviso however is of no assistance to the plaintiffs. The first of the four years for which rent is claimed in this suit is 1321. To entitle them to the benefit of the provisions contained in the proviso the plaintiffs must establish that the increased rent which they now claim has been actually paid for a continuous period of not less than three years immediately preceding 1321. But it is not disputed that the increased rent was not paid in 1320. The plaintiffs contend, however, that as rent at the increased rate was actually paid from 1314 to 1319, the requirements of the proviso have been fulfilled. We are of opinion that there is no foundation for this contention, which is opposed to the plain language of the statute. The argument of the appellants is based upon the fallacy that if rent has been paid at the increased rate for three years or longer, the rent of the holding has become permanently increased, as if there had been an increase by writing registered. That is not the effect of the proviso. The true effect of section 29 is that there is no permanent enhancement when there is an attempt to increase rent without writing registered. But still the legislature allows the landlord to realise rent at the increased rate, provided rent at that rate has been actually paid for a continuous period of not less than three years immediately preceding the period for which rent is claimed. If the landlords do not bring themselves within the precise language of this clause, they are not entitled to the benefit. In the Court below, reliance was placed by way of analogy upon section 50 of the Bengal Tenancy Act; but as the Subordinate Judge correctly pointed out whereas section 50 contemplates a case where a Tenancy has been *held* at a certain rate, *Mohini v. Preo* (1), section 29 applies only to a case where rent has been actually *paid* for a period of three years. We are of opinion that the claim for enhanced rent has been rightly disallowed.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1922) 35 C. L. J. 309.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Chotsner.*

BHAIRAB CHANDRA DUTT AND OTHERS

v.

KALI KUMAR DUTT AND OTHERS.*

CIVIL.

1922.

May, 26.

Appeal—Order for retrial—Inherent power—Civil Procedure Code (Act V of 1908), O. 41, R. 27—Entry in record-of-rights—Presumption—Document, production of, in appellate Court—Impossibility of production in primary Court.

An order allowing the appeal, setting aside the decree of the primary Court and directing a retrial of the suit with reference to a certain document, can be made by the appellate Court in the exercise of its inherent power: *Ghusnavi v. The Allahabad Bank Ltd.* (1). Such an order is a decree and an appeal can be preferred against it under section 96 read with section 100 of the Code of Civil Procedure.

Order 41, rule 27 of the Code of Civil Procedure authorises the Court to afford opportunity to a party litigant to adduce additional evidence if the appellate Court requires a document to be produced or a witness to be examined to enable it to pronounce judgment or for any other substantial cause.

An order of the Settlement authorities pronounced in proceedings which are *inter partes* is not conclusive; a presumption attaches to the order finally published under the Bengal Tenancy Act.

The record-of-rights proceedings, which were *inter partes*, were in progress during the pendency of the trial in the primary Court; but the order for final publication had not then been made. The order for final publication was made during the pendency of the appeal:

Held, that the appellate Court could direct a retrial of the suit with reference to the entry in the record of rights and such other evidence as might be adduced by both the parties.

Appeal by the Defendants.

Suit for partition.

The material facts appear from the judgment.

Babu Jyotir Bhushan Bhattacharjee for the Appellants.

Babu Upendra Kumar Roy for the Respondents.

The judgment of the Court was delivered by

Mookerjee J:—This is an appeal by the defendants in a

May, 26.

* Appeal from appellate Decree No. 1251 of 1920, against the decision of S. K. Ghose Esq., District Judge of Tipperah, dated the 2nd March, 1920, reversing that of Babu Girindra Nath Mookerjee, Subordinate Judge of Tipperah, dated the 10th August, 1918.

(1) (1917) I. L. R. 44 Calc. 929; 26 C. L. J. 49.

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suit for partition against an order for retrial of the matters in controversy. The defendants resisted the claim of the plaintiffs in the primary Court on the allegation that the land had been previously partitioned by metes and bounds and that they and their predecessors had been in separate possession for more than a century. The Subordinate Judge held in favour of the defendants and dismissed the suit. Upon appeal the plaintiffs asked for permission to adduce in evidence an entry in the record of rights which had been finally published on the 5th August 1919 long after the decree of dismissal had been made by the trial Court on the 10th August 1918. The District Judge came to the conclusion that before the matters in difference were finally decided, the entry in the record-of-rights should be taken into account. In this view, he allowed the appeal, set aside the decree of the court of first instance and directed a retrial of the suit with reference to the entry in the record-of-rights and such other evidence as might be adduced by both the litigants. Against this order for retrial, the defendants have preferred this appeal.

On behalf of the plaintiffs, a preliminary objection has been taken that the appeal is incompetent because the order was not and could not have been made under Order 41 Rule 23 Civil Procedure Code. We are of opinion that there is no force in this contention. The order does not purport to have been made under Order 41. Rule 23. It has been made in the exercise of inherent power of the Court, as explained by the Full Bench in *Ghuznavi v. The Allahabad Bank* (1). The order so made is a decree which reverses the decree of the Court of first instance and deprives the plaintiffs of the valuable right they had acquired thereunder. The appeal is, consequently, competent, not as an appeal from order under Order 43 Rule 1 sub-rule (u) but as an appeal from a decree under section 95 of the code read with section 100. Indeed, the appellants have described this appeal not as an appeal from an order, but as an appeal from a decree. The preliminary objection cannot be sustained and must be overruled.

The appellants have assailed the order of the District Judge on the ground that additional evidence should not have been allowed to be adduced in contravention of the principle recognised in Order 41 rule 27 of the Code, as explained in *Kessowji v. G. I. P. Railway Coy.* (2). We are of opinion that the District Judge has not disregarded the principle enunciated in Order 41 rule 27. That

(1) (1917) I. L. R. 44 Calc. 929 ; 26 C. L. J. 49.

(2) (1907) L. R. 34 I. A. 115 ; I. L. R. 31 Bom. 381,

rule authorises the Court to afford opportunity to a party litigant to adduce additional evidence if the appellate Court requires a document to be produced or a witness to be examined to enable it to pronounce judgment or for any other substantial cause. In the case before us, there is such a substantial cause. The record-of-rights proceedings were in progress during the pendency of the trial in the court of first instance, but the order for final publication had not then been made. It was consequently impossible for the plaintiffs to produce the decision of the revenue authorities. The order for final publication was made during the pendency of the appeal in the Court of the District Judge. At this stage alone, it became possible for the plaintiffs to bring before the Court the decision of the revenue authorities. The appellants have, however, contended that in view of the decisions of this Court in *Kumar Sarat Kumar Roy v. Sripati Chatterjee* (1), and *Baidnath v. Nanku Mahton* (2), the decision of the revenue authorities should not be used in evidence. These decisions are clearly distinguishable, as the subsequent judgment which the Court was called upon to receive in evidence was not a judgment *inter parties*. In the case before us, the order of the settlement authorities has been pronounced in proceedings which are *inter parties*. It is no doubt not conclusive: but a presumption attaches to the order finally published under the Bengal Tenancy Act. Consequently, the decisions in *Young v. Kershaw* (3), and *Nandalal v. Panchanan* (4), which disapprove of the reception of additional evidence in proceedings in review, cannot be applied to the circumstances of this case. The course adopted by the District Judge is, in our opinion, eminently reasonable and is well-calculated to avoid that ultimate conflict between the decision of the civil court and the decision of the revenue authorities which would inevitably arise if this suit were decided without reference to their proceedings.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1918) 23 C. W. N. 242.

(2) (1915) 29 I. C. 219.

(3) 81 L. T. 531.

(4) (1917) 1 L. R. 45 Cal. 60.

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Mookerjee, J.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Chotsner.

ABDUL AZIZ AND OTHERS

v.

LAKHMI CHANDRA MAJUMDAR AND OTHERS.*

Jurisdiction—Death of one of the respondents pending second appeal—No substitution of legal representative—Ignorance—Appeal heard and case remanded—Death became known after remand—Duty of lower appellate Court.

During the pendency of appeal to the High Court, one of the respondents died, but owing to the ignorance, no substitution of his legal representative was made. The hearing in the High Court proceeded on the assumption that the parties were properly represented on the record, the appeal was decreed and the case remanded for re-consideration. When the case went before the District Judge, he was informed that one of the defendants had died during the pendency of the appeal to the High Court. On that, he held that the appeal could not be reheard by him :

Held, that the jurisdiction of the High Court was not ousted by reason of the death of one of the respondents.

That the District Judge should have reported the matter to the High Court for such action as might be deemed necessary in the events which had happened.

Appeal by the Plaintiffs.

Suit for cancellation of a sale held under the Putni Regulation.

The material facts appear from the judgment.

Babu Gobinda Chandra Dey Roy for the Appellants.

Babus Abinash Chandra Ghose (for *Babu Girija Prasanna Roy Chowdhury*), *Panchanan Ghose* and *Sures Chandra Talukdar* for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J. :—This is an appeal by the plaintiffs in a suit for cancellation of a sale held under the Putni Regulation. The suit was decreed in the Court of first instance. Upon appeal by the two Zemindars, that judgment was reversed and the suit was dismissed. The plaintiffs thereupon appealed to this Court. They joined as respondents three sets of persons, viz (i) the auction purchaser, (ii) the two Zemindars and (iii) the persons alleged to be joint tenants in the putni. During the pendency of the appeal in this Court, Sarat Chandra Ghose, the executor to the estate of Saras-

*Appeal from Appellate Decree No. 1205 of 1920, against the decision of P. C. De Esq, District Judge, Noakhali, dated the 14th August, 1918.

wati Debi, one of the Zemindar respondents, died on the 10th June 1916. The plaintiffs, it is now asserted, were not aware of this circumstance and the auction purchaser as also the other zemindar respondent were equally ignorant of the event. The result was that on the 31st January 1917, when the appeal was taken up for final disposal in this Court, the hearing proceeded on the assumption that all the parties were properly represented on the record. The appeal was heard, the decree of the lower appellate Court was set aside and the case was remanded for reconsideration. When the case went before the District Judge, he was informed on the 20th December 1917 that one of the Zemindar defendants had died during the pendency of the appeal in the High Court and that the representative in interest of that Zemindar was not bound by the order of remand made by the High Court. The position consequently was that the District Judge was called upon to hear an appeal which had been preferred by the two Zemindars defendants. One of whom was bound by the order of remand while the other was dead and not affected by that order. The District Judge held, in these circumstances, that the appeal could not be reheard by him. The view he adopted was that the decree of the lower appellate Court as made by his predecessor had been vacated by the High Court with regard to one of the Zemindar defendants, but not with regard to the other. He, consequently, declined to hear the appeal, and added that the decree made by the lower appellate Court on the previous occasion stood restored in its entirety. This view, it has been urged, is supported by the decision of this Court in the case of *Kalidyal v. Nagendra Nath* (1).

On the present appeal the plaintiffs have contended that if in the opinion of the District Judge, the order of the High Court, made in ignorance of the real facts, could not be carried out, the proper course for him to follow was to intimate the true position to this Court so as to enable this Court to determine what action should be taken in the matter. On the other hand, the Zemindar respondent who was a party to the appeal on the previous occasion and is bound by the order made therein, has contended that the order of the High Court must be deemed to have been made without jurisdiction and that the District Judge was competent to treat it as a nullity. We are of opinion that this view cannot possibly be supported.

The fact of the death of one of the respondents to the appeal did not destroy the jurisdiction of the Court. If this Court had been

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apprised of the true state of facts, no doubt, the court would have made an order of a different description. That very circumstance shows that the jurisdiction of this Court was not ousted by reason of the death of one of the respondents. We are of opinion that the District Judge should not have regarded the order of this Court as if it were null or void, but should have reported the matter to this Court for such action as might be deemed necessary in the events which had happened.

The result is that this appeal is allowed and the decree of the District Judge set aside. The case is remanded and recalled to the file of this court so that it may be placed before Richardson J. who is the only member, now in this Court of the Division Bench which decided the appeal on the previous occasion. It is not proper for us to consider what order should be ultimately passed in this matter. The effect of our order is to place the parties in the position which they would have occupied if the District Judge on discovery of true facts had sent back the case to this Court. There will be no order for costs.

A. T. M.

Appeal allowed: Case remanded.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Chotzner.*

CIVIL.

1922.

May, 22.

UMAPATI SAMANTA AND OTHERS

v.

SHEIKH MASJETULLA.*

Party—Minor, non-representation of, effect of.

No person can be appointed a *guardian ad litem* of an infant without his consent.

Where the mother of an infant was appointed guardian without her consent, the infant not being represented was not a party to the litigation and was not affected by any decree passed against him: *Rashidunnisa v. Muhammad Ismail* (1) followed. *Tangor v. Jaladkar* (2) dissented from. *Walian v. Banke Behari* (3) and *Munnu Lal v. Ghulam Abbas* (4) explained.

* Appeal from Appellate Decree No. 1029 of 1920, against the decree of G. C. Sen, Esq., District Judge of Bankura, dated the 29th January, 1920, affirming that of Babu J. C. Banerji, Munsiff of Bishnupur, dated the 26th February 1919.

(1) (1909) 10 C. L. J. 318.

(2) (1909) 14 C. W. N. 322.

(3) (1903) 1. L. R. 30 Calc. 1021.

(4) (1910) 1. L. R. 32 All. 287.

Appeal by the Defendants.

Suit for recovery of possession of lands on declaration of title.

The material facts appear from the judgment.

Babu Peary Mohan Chatterjee for the Appellants.

Babu Rishindra Nath Sarkar for the Respondent.

The judgment of the Court was delivered by

Mookerjee J :—This is an appeal by the defendants in a suit for recovery of possession of land on declaration of title. The property belonged admittedly to one Sobhan who had mortgaged it to the plaintiff. The plaintiff instituted a suit on the 1st August, 1913 to enforce his security. The parties defendants to that suit were the representatives of the mortgagor who had died meanwhile. These representatives were his widow, his eldest son who was *sui juris* and three infant sons. The mother of the infants was apparently proposed for appointment as a *guardian ad litem* and we shall assume for our present purpose that the requisite notice was duly served upon her. There is no evidence to show that she entered appearance and accepted the guardianship. At the trial the suit was defended by the eldest son alone and there was no appearance on behalf of the widow either for self or as guardian of her infant sons. The trial was concluded, the arguments were heard and the judgment was reserved. Thereafter an order was recorded in the order sheet to the effect that the widow be appointed *guardian-ad litem* of her infant sons. The suit was then decreed on contest against the eldest son and *ex parte* against the other defendants. This decree was made on the 25th February, 1914. The decree was executed and at the sale which followed the plaintiff became the purchaser. In the interval the appellant had purchased the property from the representatives of the mortgagor on the 4th November, 1913 and they resisted the plaintiff when he proceeded to take possession. This is the genesis of the present suit. The Court of first instance decreed the suit and that decree has been affirmed by the District Judge. On the present appeal, it has been contended that the decree cannot be maintained beyond $\frac{1}{3}$ share and that the plaintiff is not entitled to a decree in respect of $\frac{2}{3}$ share which belonged to the three infants. In our opinion this contention is well-founded.

It is now firmly established that no person can be appointed a *guardian ad litem* of an infant without his consent. In the present case the mother of the infants was appointed without her consent. She never entered appearance and it is consequently

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needless to consider what the position would have been if she had defended the suit on behalf of the minors without a formal order for appointment. In the events which have happened, it is plain that the infants were not represented at all and they were in no sense parties to that litigation. Consequently they were not affected by the mortgage decree. This view is in accord with the rule enunciated in *Nursing Narain v. Jahi Mistry* (1); *Narendra Mandal v. Jogendra Narayan Ray* (2) and *Burendra Nath Bose v. Aghore Nath Bose* (3).

We have been pressed to hold, however, that the decree against the infant was not void but voidable, and that only at the instance of the infants themselves. In support of this view, reliance has been placed upon the decision in *Tangor Majhi v. Jaladhar Deari* (4). But that case cannot be treated as good law in view of the later decision of the Judicial Committee in *Roshidunnisa v. Muhammad Ismail Khan* (5); namely, that when a guardian has not been validly appointed in respect of a minor, he is not a party to the suit and is not bound by the decree made against him. This view is in no way inconsistent with the decisions of the Judicial Committee in *Walian v. Banke Behari* (6) and *Munnulal v. Ghulam Abbas* (7). In *Walian v. Banke Behari* (6), the person who acted as *guardian ad litem* was not formally appointed, but he was recognised as *guardian ad litem* by the Court. In these circumstances, the Judicial Committee held that after such recognition and such representation of the interest of the infant, it was too late to dispute his appointment. In *Munnulal v. Ghulam Abbas* (7), objection was taken on the ground that there was no affidavit filed before the guardian was appointed. It was ruled that the absence of the affidavit did not invalidate the appointment of the guardian. The case before us, however, is of an entirely different description. Here the record of the mortgage suit makes it abundantly clear that the infants were really no parties to the suit and are not bound by the decree made therein.

The result is that this appeal is allowed in part. The decree made in favour of the plaintiff will be restricted to $\frac{1}{3}$ share of the property which represents the interest of the widow and the eldest son of the mortgagor. Each party will pay his own costs throughout the litigation.

A. T. M.

Appeal allowed in part.

(1) (1911) 15 C. L. J. 3.

(2) (1914) 19 C. W. N. 537.

(3) (1930) 25 C. W. N. 525.

(4) (1909) 14 C. W. N. 322.

(5) (1909) 10 C. L. J. 318.

(6) (1903) I. L. R. 30 Calc. 1021.

(7) (1910) I. L. R. 32 All. 287.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Chotzner.

UMARANNESHA BIBI

v.

JANURANNESHA BIBI AND ANOTHER.*

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May, 23.

Deed—Execution of different deed—Deed, if to be avoided—Declaratory suit—Consequential relief—Specific Relief Act (I of 1877), Sec. 42 Proviso—Court-fee.

When a person is induced to execute a document other than what he had undertaken to execute, the document is void and need not be cancelled.

The plaintiff's asking for consequential relief in a declaratory suit, depends upon the circumstances of each case : *Aisa Siddika v. Bidhu* (1) and *Baktamar v. Bhuban* (2)

Where the plaintiff alleges that she is still in possession of the property but all that she requires at the time of suit is a declaration that the deed which is in the hands of the defendant is not her deed, the Court-fee payable on the plaint is rupees ten.

Appeal by the Plaintiff.

Suit for declaration.

The material facts appear from the judgment.

Babu Heramba Chandra Guha for the Appellant.

Babu Birendra Kumar De for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the plaintiff in a suit for declaration that a conveyance executed by her on the 18th February 1916 was void and inoperative. The case for the plaintiff is that it had been represented to her that the document was a deed of mortgage and that on the faith of this representation she affixed her signature thereto. She has since discovered that the document is in reality a conveyance. She further alleges that notwithstanding the execution of the document and the delivery of the deed to the defendant she is still in possession. In the Court of first instance, a question was raised, whether a suit of this description could be regarded as a suit for declaratory decree and whether Rupees ten was the proper court-fee payable on the plaint. The trial Court an-

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* Appeal from Appellate decree No. 777 of 1920 against the decision of J. Johnston Esq. District Judge of Rungpur dated the 4th November 1919 affirming that of Babu Debendra Nath Banerjee Subordinate Judge of Rungpur dated the 30th April 1918.

(1) (1912) 17 C. L. J. 30. (2) (1912) 17 C. L. J. 468.

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wered this question in favour of the plaintiff, but on the merits dismissed the suit. Upon appeal, the District Judge has not considered the merits of the case, but has dismissed the suit on the ground that the plaint was inadequately stamped. We are of opinion that this view cannot be supported.

There can be no room for controversy that if the allegation of the plaintiff is well-founded, the document cannot be treated in law as her deed, and was not merely voidable but void *ab initio*. This view is based on the principle that where a person is induced to execute a document other than what he had undertaken to execute, the document is void and need not be cancelled. Illustrations of this principle will be found in *Thorough good's case* (1) and *Foster v. Mackinnon* (2). In *Thorough good's case* (1), it was held that if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed. In *Foster v. Mackinnon* (2) Byles J. pointed out that this doctrine was not confined to the condition of an illiterate grantor and that it made no difference whether the grantors were lettered or unlettered. The essential position is that if a grantor or covenantor be deceived or misled as to the actual contents of the deed, the deed does not bind him; *Edwards v. Brown* (3), *Swan v. North British Australasian Company* (4). In *Foster v. Mackinnon* (2), it was further pointed out that this principle is not limited in its application to deeds, but that the doctrine is equally applicable to other written contracts. In that case, a person had been induced to put his name upon the back of a bill of exchange by the fraudulent representation of the acceptor that he was signing a guarantee. It was ruled that such a signature was not operative in law. The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect but also as to the actual contents of the instrument. This principle has been repeatedly recognised and applied; *Banke Behari Shaha v. Krishto Govinda Joardar* (5); *Chooramani Dasi v. Baidya Naik* (6), *Sauni Bibi v. Siddik Hossen* (7).

On behalf of the respondent it has been urged, however that if this be treated as a suit for a declaratory decree the plaintiff is

(1) (1582) 2 Co. Rep. 9. b.

(2) (1869) L. R. 4 C. P. 704.

(3) (1831) 1 C. & J. 307.

(4) (1863) 2 H. & C. 175.

(5) (1902) 1. L. R. 30 Calc. 433.

(6) (1904) 1. L. R. 32 Calc. 473.

(7) (1918) 29 C. L. J. 55.

bound to ask for consequential relief under the proviso to section 342 of the Specific Relief Act, and that if she asks for such consequential relief she is bound to pay Court-fees *advalorem* on the plaint. There is no foundation for this contention. It was pointed out in *Aisa Siddika v. Bidhusekhar Banerjee* (1), *Baktawar Singh v. Bhuban Singh* (2) that the answer to the question whether it is incumbent upon the plaintiff to ask for consequential relief, must depend upon the circumstances of each case. It is plain that there may be cases in which a declaration may be sufficient for his protection. In such an event, the plaintiff cannot be compelled to seek a consequential relief. In the present case, the plaintiff alleges that she is still in possession of the property and all that she requires at the present moment is a declaration that the deed which is in the hands of the defendant is not her deed. We are of opinion accordingly that the Court-fees payable on the plaint is sufficient and that the appeal should have been considered on the merits.

The result is that this appeal is allowed, the decree of the Court of appeal below set aside and the case remanded for decision of the appeal on the merits. The appellant is entitled to the costs of this appeal.

We direct under section 13 of the Court-fees Act that the Court-fee paid upon the memorandum of appeal to this Court be returned to the appellant.

A. T. M.

Appeal allowed : Case remanded.

(1) (1912) 17 C. L. J. 30.

(2) (1912) 17 C. L. J. 468.

PRIVY COUNCIL.

PRESENT :—*Lord Atkinson, Lord Sumner, Lord Carson and Mr. Ameer Ali.*

SRIMATI SARATKUMARI DAS

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AMULLYADHAN KUNDU AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT CALCUTTA]

Pardanashin lady—Litigation—Compromise *cc—Consent—Onus—Appeal*
—*Security for Costs—Court deposit under compromise decree—Estoppel.*

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The appellant, a *pardanashin lady* sued and obtained a decree against the respondents. When the respondents' appeal against the decree was pending in the High Court, the matter was compromised on the appellant's behalf and the respondents deposited a sum of money in Court under the compromise. In a suit by the appellant challenging the validity of the compromise,

Held, that the onus of proving that the compromise was made with full knowledge and consent of the appellant lay on the respondents.

Held, also, that the fact of her having applied and obtained an order from the Court to hold the deposit made under the compromise as security for the costs of the respondents in her appeal to the Privy Council, did not estop her from impeaching the validity of the decree.

Taccordeen Tewarry v. Nawab Syed Ali Hossain Khan (1). *Shambati Koori v. Jago Bibi* (2), followed.

Sunitibala Debi v. Dhara Sundari Debi (3) distinguished.

Neal v. Lennex (4) referred to.

Decree of the High Court reversed.

Appeal (No. 81 of 1921) from a Decree of the Calcutta High Court. (Richardson and Shamsul Huda JJ) dated 27th February 1920, reversing a decree of the Additional Subordinate Judge of Howrah.

The appellant purchased some land from the father of the respondents. After the death of the vendor, the respondents refused to deliver possession of the land. The appellant then instituted a suit for a declaration of her title and for recovery of possession and obtained a decree from the Court of the Subordinate Judge of Howrah. The respondents preferred an appeal to the High Court. During the pendency of the appeal, a compromise was effected by the pleaders and a decree in accordance with the compromise was passed. The appellant applied to have the compromise decree set aside on the grounds that she had no knowledge of it and never consented to it but her petition was refused. The respondents deposited Rs. 13, 500 under the said decree.

The appellant then brought the present suit to set aside the compromise decree made in the other suit. The trial Judge decreed the suit. On appeal, the High Court took additional evidence of the pleaders who signed the compromise and came to the conclusion that the pleaders had no authority to compromise and that there was no evidence that the appellant consented to the compromise. The Court, however, was of opinion that the compromise

(1) (1874) L. R. 1 I. A. 192

(2) (1902) L. R. 29 I. A. 131; 6 C. W. N. 682.

(3) (1919) L. R. 46 I. A. 272; 1 L. R. 47 Calc. 195.

(4) (1902) A. C. 465.

was made with the full knowledge and consent of the appellant's brother. The decree of the trial Judge was therefore reversed. The appellant preferred the present appeal. She applied and obtained an order from the High Court that Rs. 4,000 out of the Rs. 13,500 deposited by the respondents under the compromise decree, should be held as security for the costs of the respondents.

The facts and the arguments in the case appear from the judgment of their Lordships.

De Gruyther K. C. and *Dube* for the Appellant ;

Abdul Majid for the Respondents.

C. A. V.

The judgment of their Lordships was delivered by

Lord Atkinson :—This is an appeal from a judgment and decree dated the 27th February, 1920, of the High Court of Judicature at Fort William in Bengal which reversed a judgment and decree dated the 17th April, 1919, of the Additional Subordinate Judge of Howrah. The main question for determination by the Board is whether or not the compromise of a certain suit instituted by the appellant to recover possession of certain lands theretofore purchased by her from one Dharma Das Kundu, since deceased, purporting to have been made and entered into on the 7th February, 1917, had in fact been so made and entered with her full knowledge and consent or the contrary. The appellant is a *purda-nashin lady* aged about 43 years. She has two sons, Raman and Srish the latter of whom appears to be competent to some extent to transact business, and two brothers named Satish, about 47 years of age and the other, Sailadhar, who is younger. She can write and read in Bengali, can sign her name, and from her evidence would appear to be a person of some intelligence. The trial Judge found on the evidence before him that this compromise was not made and entered into with the knowledge and consent of the appellant. The appellate tribunal found on the evidence the affirmative proposition that it was so made though that proposition was denied by the appellant and not proved directly by any document or by any witness. Their Lordships are not for the reasons to be stated hereafter able to take the view of the evidence upon this point which commended itself to the appellate Court. They think this latter view was erroneous and incline to think that this was due to the fact that the two learned Judges, Richardson and

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Shamsul Huda, dealt with the case without keeping sufficiently before their minds that an affirmative proposition is not established by showing that the evidence of witnesses who depose to a contradictory negative proposition is not reliable. The proposition that the appellant consented to the compromise entered into is an affirmative proposition. She and one of her brothers practically deny that she ever consented to it. No witness gives direct and positive evidence that she did consent to it. Yet these learned judges consider that as the circumstantial evidence given in the case would go to show that the evidence of the appellant and her brother on this point was not reliable, they are therefore entitled to hold the affirmative proposition that she did give her consent to the compromise was proved. Of course, if there was a conflict of evidence on this point, some witnesses asserting that the appellant did consent to this compromise, some the contrary, it would be perfectly legitimate to take into consideration the circumstantial evidence with a view to show that evidence of the first class of witness was true and that of the second false. But on this case, as will presently be shown, there is no conflict of evidence of this kind. The facts of the case may be shortly stated as follows.

On the 15th November, 1913, the appellant bought from the said Dharma Das Kumari (Kundu) certain land for the sum of Rs. 9,500. He died on the 6th of February following. He left three sons and three grandsons him surviving who are all respondents in this appeal. The appellant did not get possession of the land she purchased, and on the 11th July, 1914, she instituted against the abovementioned sons and grandsons of Dharma Das Kumari (Kundu) a suit for a declaration of her title to the land purchased and for the recovery of the possession thereof. The eldest son of the deceased Amullyadhan, and the three grandsons denied her claim and contested the validity of the sale, but the two younger of the vendor's sons filed a written statement admitting that her claim was just and well founded. The Subordinate Judge of Howrah who tried the case made on the 23rd August, 1915, a decree allowing the appellant's claim with mesne profits and costs. From that decree the eldest son Amullyadhan and the three grandsons of the deceased appealed to the High Court at Fort William in Bengal. The appellant executed a power of attorney appointing several persons, namely, Babu Probodh Kumar Das amongst others her vakils to argue her case, to inspect the records, execute documents and deposit and withdraw monies and do all such other acts, the same to be accepted and ratified as acts done by her. It has been well

established and is not, as their Lordships understand, questioned in this case, that a vakil appointed under such a power of attorney as this is not endowed with power or authority to compromise the suit he is thus retained to argue. The appeal came on in the High Court before Fletcher and Richardson JJ. on the 6th February, 1917. One Babu Haradhan Chatterjee appeared as vakil for the respondents, and the appellant appears to have been represented in addition to Vakil Probodh Kumar Das by a well-known barrister, Mr. B. Chakravarti. After the hearing had proceeded for some time the learned Judges suggested that the appeal might well be compromised. The appellant's vakil at this juncture desired to consult her Counsel, Mr. Chakravarti, but that gentleman's attendance could not be procured apparently because he was engaged in another Court. The vakil then asked for time to consider the suggestion made, and in compliance with that request the terms of the compromise were embodied in the following document, written in English, which was on the 7th February, 1917, signed by the vakils of both parties and duly filed in Court. It ran thus :—

It may be ordered by consent that defendant No. 1, Amullyadhan Kundu, do pay to the plaintiff, Saratkumari Dasi Rs. 13,500 (thirteen thousand and five hundred only) within 22nd February 1917. On such payment being tendered and deposited in this Honourable High Court to the credit of the said Saratkumari Dasi on the said date the plaintiff, the said Saratkumari Dasi, do convey to the defendant No. 1, the said Amullyadhan Kundu at the defendant No. 1's cost, the property in dispute in this appeal, free from all encumbrances, if any, created by the plaintiff since the purchase of the said property by her on the 15th November, 1913, and subject to all encumbrances existing before the date of purchase by the plaintiff (Sm. Saratkumari Dasi). If such payment be not tendered within 22nd February, 1917, the appeal stands dismissed with costs.

It is not pretended that the effect of this document was ever explained to the appellant by her vakil or by any other person. She never signed it, or a copy of it, or any document which would show that she was acquainted with its existence, contents or effect. It is written in the English language, which neither the lady nor her vakil understand. She positively swears that she never authorized a compromise of her suit to be entered into and as will presently be shown, when she ultimately was informed that this had been done her conduct and action were much more like that of a woman who felt that her confidence had been betrayed, and her interests

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sacrificed, than that of one who was struggling to break a bargain made on her behalf of the nature of which she was well aware and of which she at first approved.

Being a *pardanashin lady* she apparently authorized her brother Satish Chandra to attend the Court in which her action was about to be heard and look after the proceedings in the suit but as will presently be shown there is no evidence to establish that she either expressly or impliedly clothed him with plenary authority to compromise on her behalf, this suit which she had instituted to recover possession of the land she had purchased.

On the 21st February, 1917, the principal defendant, the eldest son of the vendor, tendered to the appellant's vakil Babu Probodh Kumar Das the sum mentioned in the document of compromise, Rs. 13,500. He refused to receive it. The matter was brought before the High Court on the following day, the 22nd February, 1917, when it was by that Court ordered that the money should be brought into Court. This has been done. On the same day, the 22nd February, 1917, she states in her evidence that she first heard of the compromise of her suit. In her evidence in the present suit she gives the following account of the way in which she came to know of it. She says : " My brother Satish not having come to my house for 15 or 16 days I sent for him through my son Srish. He came to see me on the 10th Falgun, 1323 (*i.e.*, the 22nd February, 1917). I having inquired of him about the case, he said that the case had been compromised. On hearing that news I had a quarrel with my brother. After that I filed through my son a petition to the High Court for setting aside the compromise." She adds, " since the quarrel with my brother he did not come to my house. I would suffer loss if I made the compromise for Rs. 13,500 because Rs. 17,000 or Rs. 18,000 have been spent by me on account of the purchase of the land and litigation expenses."

On the 28th March 1917, one month and six days after she had, as she swears, first heard of the compromise she took the proceedings indicated in the foregoing passage of her evidence. She had an application made to the High Court to a review of the proceedings in the suit in which the compromise had been entered into, with the view of having the latter set aside on the ground that it had been entered into without her authority or consent. This application was, on the 11th May, 1917, for some reason not fully explained, refused. Whereupon the appellant on the 25th July, 1917, instituted the present suit. The grounds upon which the

High Court apparently based their decree which is appealed from are expressed concisely in the following two passages from their judgments. Mr. Justice Richardson said : " I am satisfied that the respondent's brother Satish acted as her accredited agent throughout, and that the compromise of the 7th February was entered into on her behalf and with her consent. The respondent agreed at the time to a settlement not unjust to her but changed her mind afterwards. The bargain cannot be undone. *Neal v. Lennox* (1)"; and Mr. Justice Huda said : " As I have said before the evidence of Probodh Babu and Haradhan Babu place the fact of her consent to the compromise beyond any doubt. I therefore hold that Sarat Kumari did consent to the compromise and now has come forward to repudiate it falsely." It will be observed that the conclusions at which the learned Judges have arrived do not agree. Mr. Justice Richardson held that the appellant's consent to the compromise was given, not by the appellant directly, but by her brother, her agent, fully authorized on that behalf. In the case of the second learned Judge it is very doubtful whether he comes to the same conclusion as does his brother Judge, or to the conclusion that though as he admits there is no direct evidence of consent by the appellant, the circumstantial evidence of it is very strong. He says he rejects the evidence of Satish and Saila, the appellant's brothers, as wholly unreliable. He then deals with the circumstantial evidence upon which he relies in this fashion. He says :—

Satish, as I have said, was acting in the interest of his sister. On the 6th he and his brother were both present in Court. When the Court suggested a compromise, time was given to enable Satish to consult his sister. They were not living far off. Satish was living at Pataldanga and Saratkumari at Bagbazar. The distance between the two places is only about a mile. It is inconceivable that neither of the two brothers went to Saratkumari to take instructions from her about the compromise. According to Probodh Babu, Satish saw him in the evening and told him his sister would like to get a little more money, that accordingly the next day he was able to induce the learned Vakil on the other side to raise his offer to Rs. 13,500. Admittedly both Satish and Saila were present in Court and I have no doubt they consented to the compromise on behalf of their sister.

This line of reasoning is directed to show that Satish and Saila sought for and obtained from their sister on the 6th February

(1) (1902) A. C. 465.

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authority to consent to the compromise after they had duly informed her of the suggestion that had been made, while Mr. Justice Richardson held, to use his own words, that "Satish was the accredited agent of his sister throughout" (which their Lordships presume means from the first) "and that the compromise of the 7th of February was entered into by him on her behalf and with her consent."

The very fact that time was given to consider the compromise suggested by the Court is the best proof that Satish was not given from the first and not taken to have been so given such dominion and control over the litigation as would have entitled him to compromise the suit without consulting his sister.

Such being the apparently inconsistent conclusions at which the two learned Judges arrived, it is necessary to examine the evidence to endeavour to discover whether there was any evidence before them from which these conclusions as inferences from established facts, not mere conjectures or suspicions, or surmises could legitimately be drawn. Turning to the evidence of the appellant one finds that in her evidence in chief she deposes as follows:—

My name is Saratkumari Dasi. My husband's name is Beni Madhab Dawn. My age is 43 or 44 years. The house in which I have been giving deposition is my own house. I, plaintiff, have instituted suit in the Howrah Court. Amullya filed, in the Honorable High Court, Appeal No. 393 of 1915 against me. Satish Dutt is my eldest uterine brother. He used to look after the said appeal case of mine. I gave no authority to my said uterine brother to compromise the said appeal. I made no Solehnama in the case at High Court. I did not give to my said brother consent to file any Solehnama, relinquishing the property on taking Rs. 13,500. I did not give to the Vakils, who were engaged on my behalf in High Court, any authority to compromise the said appeal case. My eldest brother Satish or youngest brother Saila or my son Srish did not show any Solehnama to me nor read out the same to me. I did never, through my brother Saila and Satish or my son Srish apprise my Vakils at High Court of my consent to make Solehnama. I did never, through those persons, tell them to make Solehnama on taking Rs. 16,000 or on taking Rs. 13,500 exclusive of the amount due under the mortgage to Prandhan Babu. My eldest brother Satish never brought and read out the draft of any Solehnama to me nor showed the same to me. My eldest brother Satish never informed me of the fact that a talk of compromise was going on in High Court. If I had heard of the Solehnama I would not have given consent to same.

She was subjected to a long, tedious and mainly irrelevant cross-

examination. Nothing discrediting her evidence in chief was elicited while she added that her brother and sons engaged her vakils ; that she had no interviews with any of them and that the quarrel with her brother Satish to which she referred was not " very abusive between brother and sister, but an altercation," that she said to him, " Why did you do this without my consent ? " Their Lordships find nothing in any part of her evidence to sustain the suggestion of the second learned Judge that this lady got sorry for having consented to the compromise, changed her mind and came forward to repudiate it falsely.

Satish, when examined, proved that he was a trader, accustomed to look after his sister's case upon appeal and then alleged that the compromise was made without reference to her ; that on the morning of the 6th of February Dr. Mitter commenced his argument about noon, that about 2.30 or 3 p. m. Probodh Babu (the appellant's vakil) spoke to him on the verandah of the Court, saying that the Judges had suggested that the case should be amicably settled, that he was not agreeable to this, and then this vakil asked him to come to his, the vakil's, residence at night when he would speak about the matter. The Court was adjourned, but he says he does not know whether that was before or after the conversation. He says that he did not communicate (*i. e.*, about the proposal) with his sister, that he went to the vakil's residence that night and told him (the Babu) he was not willing to compromise ; that this Babu then asked him to come to Court on the following day, the 7th, which he did. The appellant's sons, he says, were not present in Court on the 6th of February ; that Dr. Mitter resumed his argument on the 7th ; that about 1 o'clock the same vakil asked his brother Saila who was with him to call on Mr. Chakravarti, which his brother went to do. The witness further says that Probodh Babu asked him to come to the verandah of the Court, which he, the witness, then did, when the former told him that if the suit was dismissed by Mr. Justice Fletcher they would be put in a great difficulty, so it would be better to compromise it. That he, the witness, replied he could not say anything about the matter ; that he, the vakil, might do what he thought best ; that he, the witness, did not agree to the vakil compromising the case. When witness's brother had returned he said the vakil had gone back to the Court Room and talked there with Dr. Mitter and Haradhan Babu when Dr. Mitter took a paper and wrote down something in English, which language the witness does not understand ; that Probodh Babu then asked the witness to sign it, which he, the witness, refused to do,

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saying that before he could sign it, it was necessary his sister should consent to it. That the paper was then signed by the two vakils and filed by Dr. Mitter. The appellant's sons were not, the witness says, in the Court on the 7th, and then he states that he, the witness, did not go to inform the appellant of the compromise as he apprehended she would disapprove of what had been done. He is cross-examined, but nothing to shake his evidence in chief would appear to their Lordships to have been elicited from him. He adds that he did not inquire what had been written by Dr. Mitter, that the terms of the compromise were not read over or explained to him, but that Probodh Babu told him that on the defendant in the suit paying Rs. 13,500, the case would be compromised. If this witness had from the first plenary authority to compromise this suit, as Mr. Justice Richardson apparently holds or if during the adjournment he had obtained from his sister authority to consent to the compromise, as apparently Mr. Justice Huda holds, it is difficult, if not impossible, to suggest any rational explanation of his refusal to sign the document. Owing to the secluded life purdanashin ladies live, and the consequent inexperience in the conduct of business, legal or other, the law throws its protection around them,

In the case of *Tucoordeen Tewarry v. Nawab Syed Ali Hossein Khan* (1), Sir Montague Smith stated the law upon the point thus. According to the principles which have always guided the Courts in dealing with sales or gifts made by *pardanashin* ladies the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them, that the transaction was a real and *bona-fide* one and was fully understood by the lady whose property is dealt with. In *Shambati Koeri v. Jago Bibi* (2) Sir Andrew Scoble said: "It is a well-known rule of this Committee that in the case of deeds and powers executed by *pardanashin* ladies it is requisite that those who rely upon them should satisfy the Court that they have been explained to and understood by those who executed them." And in *Sunitabala Dibi v. Dhara Sundari Debi Chowdhurain and another* (3), this principle was applied to an agreement to compromise litigation, but it was held to be sufficient to show that the general result of the compromise, as distinct from the details and legal technicalities involved, was understood by her, and that disinterested and competent persons with a fair understanding of the whole matter advised her to execute it.

(1) (1874) L. R. 1 I. A. 192 (206) ; 21 W. R. 340.

(2) (1902) L. R. 29 I. A. 131 ; 6 C. W. N. 682.

(3) (1919) L. R. 46 I. A. 272 ; I. L. R. 47 Calc. 195.

Nothing of this kind was shown in this case. There is no proof that the lady knows English. Satish proves that the document filed was written in English. He is not contradicted on this point. The lady's vakil, it appears to their Lordships, failed in his duty towards her; he never saw her, never spoke to her in reference to this compromise, nor had he any communication with her touching it. Had he acted properly and explained this compromise to her after which she approved of and consented to it, she would in all probability have signed it, and all this litigation would have been avoided.

The learned Judge also says in his judgment, "the evidence both of Probodh Babu and Haradhan Babu places the fact of the appellant's consent to the compromise above any doubt." It is essential then to examine the evidence of these witnesses with great care. They were examined by the Court and not by the vakil of the parties.

The evidence of Babu Haradhan Chatterjee ran as follows :—

"Q.—Will you state as shortly as possible your recollection as to what happened on the 6th and what happened on the 7th February?

"A.—Dr. Mitter, who was leading me, was arguing and discussing the evidence.

"Q.—Were you addressing the Court?

"A.—No. Dr. Mitter was addressing. I was present. I was seated by his side. I was instructing him. Then Mr. Justice Fletcher threw out a suggestion, whether my client is willing to purchase the whole property, that is to say, the defendant No. I. Dr. Mitter asked me whether the client was willing to do so. Previously we thought that if there was a suggestion to purchase the property, we would accept it. Dr. Mitter said 'we are agreeable to purchase the property.' Upon that, Mr. Justice Fletcher asked the other side, Probodh Kumar Das, whether he is agreeable to compromise the suit, and asked Dr. Mitter what the terms will be. Dr. Mitter suggested that we were agreeable to pay the purchase-money with compound interest and that was the suggestion asked by Mr. Justice Fletcher whether that would be agreeable to the other side. Probodh Babu said I cannot say without asking my clients. Both the brothers Satish and Saila were standing behind him and they held a consultation amongst themselves. After that they said, 'we cannot say anything to that, we shall speak about this matter to-morrow; unless we consult the client we cannot say anything to it. On that day it was arranged for 13,000 plus the

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mortgage money. This matter was adjourned at that time. Satish was standing behind Probodh Babu, and Mr. Justice Fletcher addressing him, told him 'tell your sister that the compromise will be to her benefit. I have thoroughly understood the case and in my opinion it is a benami transaction.'

"Q.—We want to know exactly what happened on the 7th?

"A.—On the 7th they wanted more. Afterwards it was settled at 13,500.

"Q.—Afterwards—when? On the same day or the next day?

"A.—On the 7th, after some consultation with Dr. Mitter, myself on one side and Probodh Babu and Satish and Saila on the other side. Then the draft was made recording the terms. Probably I drew out the draft in consultation with Dr. Mitter and Probodh Babu. This draft was taken away by Satish to show to somebody, but I do not know to whom. He said 'I will show it to some friend of mine.'"

The evidence of Babu Probodh Kumar Das ran as follows :—

"Q.—Can you tell us as briefly as possible what took place first on the 6th and then on the 7th?

"A.—So far as I remember the arguments were going on when there was a suggestion made by the Court, viz., Mr. Justice Fletcher to Dr. Mitter, whether he was willing to purchase the whole property. Dr. Mitter said that he would accept that and that he would pay compound interest. On that, Mr. Justice Fletcher asked me whether my client would be agreeable to that. I asked my client Satish and his brother Saila whether they agreed to it. They had a consultation among themselves as to whether that would be profitable to them and that did not take more than two or three minutes. After that Satish asked me to take time to consider the matter and that was also necessary because I was appearing for a purdanashin lady and had to take her instructions in the matter. I said to him, 'You had better go and consult about the matter and come to me at night at my house.' So he went away and came at night on that very day at my house and told me that his sister would like to have a little more than was offered. I said that I would ask Dr. Mitter whether his client is agreeable to that. The next morning when the case was called on at 11 a.m., then I told Dr. Mitter that my client would require something more because the amount which was offered was barely sufficient to cover expenses. Then Dr. Mitter consulted or did something and then within a few minutes Dr. Mitter said, "we can offer so much." I told my client that that was the

utmost that he could get. He could do what he liked. Then Dr. Mitter asked for some time from the Court. Time was given. I went away on another case which was called on at that time.

"Q.—That was on the 6th?

"A.—That was the next day, the 7th.

"Q.—On the 6th night your clients came and told you that they required something more?

"A.—Yes. On the 7th when I came to Court they told me to try and get something more. I said to Dr. Mitter that unless something more was offered my client was not agreeable to the compromise.

"Q.—And Rs. 500 more was offered?

"A.—Yes.

"Q.—Did you ask your client to go and fetch Mr. Chakravarty?

"A.—I do not remember if I did.

"Q.—No occasion arose for any argument?

"A.—So far as I remember no occasion arose for argument on the 7th.

"Q.—Were you present at 2-30 when the petition was put in?

"A.—Yes. Dr. Mitter handed something to Haradhan Babu. He read out and I handed it over to my client who took it away and went away.

"Q.—You distinctly remember you never sent for Mr. Chakravarty?

"A.—I cannot be positive about it, it is so old."

Nothing of importance beyond this was elicited.

The Appellate Court insisted quite properly upon the examination of these two vakils. They treat their evidence as so much in conflict with the evidence not only of the two brothers of the appellant but of the appellant herself as to utterly discredit her and them as witnesses, and yet it never apparently occurred to the learned Judges that it would have been well if the brothers of the appellant had had an opportunity of cross-examining these vakils on the portion of their evidence in conflict with their own. No such opportunity was given. Again, the evidence of these vakils deals only with what occurred in the Court. It may show that they, the appellant's brothers, had an opportunity of informing her of the fact that a compromise was proposed and of obtaining her consent to it. It may even go so far as to raise a suspicion that she was informed of it and did consent to it. It may tend to discredit the evidence of the brothers which was in conflict with it. It is, however, inconsistent with the assumption that Satish had from the first

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plenary authority from his sister to compromise the suit in any way that seemed good to him. In that case asking for her consent to the compromise proposed would have been quite unnecessary. But in their Lordship's view it is quite insufficient in face of the distinct denial of the appellant to establish the affirmative proposition that she did in fact consent to this compromise, the burden of proving which rests upon the respondents. In their Lordship's view they have failed to discharge that burden.

There is one matter that may account for the unbusinesslike manner in which this compromise was arranged and carried out. The appellant was cross-examined at length apparently to show either that the money she paid for the lands she purchased was not her own or that she gave or lent money to her brother Satish to purchase them for himself. Mr. Justice Fletcher suggested from the Bench that the purchase might have been a *benami* transaction, and Babu Probodh Kumar Das in evidence calls Satish his client. At one part of his evidence he uses the words "My client Satish," at another, "I handed it (the compromise paper) to my client, who took it away with him." It may possibly be that he believed that the property was purchased for Satish, that he was the real owner of it, and that he, therefore, thought it was unnecessary to take the precautions which he probably would have taken if he had believed this purdanashin lady, the appellant, was the real owner.

The case of *Neale v. Gordon Lennox* (1) referred to, has no application to the present case.

The respondents rely upon another point.

It is this. The appellant, after having obtained leave to appeal to His Majesty in Council, applied to the Court for, and on the 2nd of September, 1920, obtained an order that Rs. 4,000 (portion of the Rs. 13,500 paid into Court), should be held as security for the costs of the respondents in the appeal to this Board. It was contended that this transaction amounted to an adoption by the appellant of the decree while at the same time she was impeaching it, and was, therefore, estopped from doing so. If the appellant should fail in this appeal, the money lodged in Court will belong to her. If she succeeds in the appeal the money lodged in Court will be returned to the respondents, subject, however, to any claim she may successfully establish to have any costs awarded to her paid out of it. In their Lordships' view, the point is entirely unsustainable. On the whole, therefore, their Lordships are of opinion that the appeal succeeds, that the judgment and decree appealed from were

(1) (1902) A. C. 465.

erroneous and should be reversed, that the judgment and decree of the Additional Subordinate Judge was right and should be restored, and that the respondents should pay to the appellant her costs of the appeal to the High Court and of this appeal, and they will humbly advise His Majesty accordingly.

Barrow, Rogers & Nevill : Solicitors for the Appellant.

J. Tucker :—Solicitor for the Respondents.

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Appeal allowed.

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PRESENT : *Lord Buckmaster, Lord Phillimore, Sir John Edge
and Sir Lawrence Jenkins.*

RAJANIKANTA PAL AND OTHERS

v.

JAGAMOHAN PAL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT CALCUTTA.]

Hindu Law—Joint family—Dayabhaga school—Business and ancestral property—Bequest of moveables and shares of joint business by one member—Moveables and immovables acquired out of the income and profits of joint business—Joint property income mixed up with the business accounts—Effect—General presumption.

Three brothers governed by Dayabhaga school of Hindu law inherited certain immovable properties and a joint business in yarns and cloth. One of the brothers died in 1902, leaving a Will by which he gave power to his widow to adopt, his immovable properties to go to such adopted son and his movables and the third share in the joint business to go to his brother Jagamohan. The widow adopted and the family continued to live and carry on business jointly as before. The income from the joint properties was mixed up with the accounts of the joint business. Moveable and immovable properties were acquired from time to time out of the income and profits of the joint business. On a claim by Jagamohan to a third share in all the properties acquired out of the income of the joint business.

Held, that the circumstances were not sufficient to displace the general presumption that arises when members of a joint family, who have control over the joint estate, blend that estate with property in which they have separate interests; that the effect in such transactions was to cause the whole property to become joint and that Jagamohan was only entitled to an equal share with the other branches of the family in all the properties.

Suraj Narain v Ratan Lal (1) ; applied.

(1) (1916-17) L. R. 44 I. A. 201 ; I. L. R. 40 All. 159.

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Decree of the High Court modified.

Appeal (Teunon and Richardson JJ.) from a Decree of the Calcutta High Court, modifying a Decree of the Subordinate Judge (Second Court) of Dacca.

The suit was brought by the respondent for partition, accounts and other incidental reliefs. He claimed a one-third share in the immovable properties acquired by the family up to the death of his brother Radhagobind Pal in 1902 and two-thirds in all the movable properties since acquired. The later claim was based upon the Will of Radhagobind by which the testator bequeathed his movables and his third share of the joint family business to the plaintiff. The suit was resisted on the ground that the plaintiff gave up his right under Radhagobind's Will and was consequently entitled to a one third share in all the properties and assets of the family.

The trial Judge held that the plaintiff never gave up his right under Radhagobind's Will; that he did not however intend to retain a two-thirds share in the properties set out in Schedules 3 and 4 and that the moveables in Schedules 5 (Ka) and 5 (Kha) were joint property. He gave the plaintiff a decree for a one-third share in the properties set out in Schedules 1, 2, 3, 4, items 1 to 3 of 5 (Kha) and 6; a two-thirds share in the moveables set out in Schedule 5 (Ka).

On cross-appeals, the High Court affirmed the main finding of the trial Judge that the plaintiff never gave up his right under the will of Radhagobind but modified the decree of the trial Judge by giving the plaintiff a two-third share in schedule 3 and items 1 to 3 of schedule 5 (Kha). The High Court also directed that defendants 2 and 3 should be paid out of the plaintiff's share Rs. 4,000 with compound interest at 12 per cent. per annum. Hence the cross-appeals.

Sir George Lowndes K. C. and *Parikh* for the Appellants: The appeals relate only to properties covered by Schedule 3 and Schedule 5 (Kha). Schedule 3 contains the list of immovable properties purchased subsequent to the death of Radhagobind. The other Schedule includes investments, Government paper and houses. All these were no doubt acquired out of the income and profits of the joint business. But the income of the joint business was not kept separate in the family accounts. Admittedly there is joint family property. The will of Radhagobind affects only the movables and his share in the joint business. The

other movable and immovable properties remained joint. The accounts of the family were always kept in the same manner. The expenses of the probate of Radhagobind's Will were entered in the same accounts. The income from the joint estate was treated in the same way as the income of the joint business. These circumstances clearly establish that the parties intended to treat all the movable and immovable properties as joint property. It is not possible to draw any other conclusion. The principle of the decision in *Suraj Narain v. Ratan Lal* (1) applies. There the income of the separate estate was brought into the joint family account and in this case, the joint family property was brought into the separate accounts. It makes no difference in principle.

Dunne K. C. and *Bagram* for the Respondent : It is found by both the Courts in India that the plaintiff never gave up his right under his late brother's Will. It is also found that all the properties were acquired out of the income and profits of the joint business. Therefore all the properties partake of the character of the joint business. The plaintiff is admittedly entitled to a two-thirds share in the joint business. The same is applicable to the properties in question. The fact that the accounts were kept in the same manner throughout is not material. The income received from the joint estate was shown under separate heads in the accounts. It is quite possible and easy to separate the two accounts from the account books. In fact, the amounts paid to Radhagobind's widow and adopted son are in excess of their interest in the joint estate. Where the income from the two sets of properties can be easily determined, there can be no presumption that the parties treated the whole as joint. *Suraj Narain's case* (1) is distinguishable on the facts.

The judgment of their Lordships was delivered by

Lord Buckmaster :—The facts in this case have been carefully investigated both by the Subordinate Judge and by the High Court, with the result that many of the points originally in dispute are now determined, and the two that remain depend upon the true inference to be drawn from ascertained circumstances and not from the consideration of what those circumstances may be. Upon these two questions there is a difference of opinion between the Subordinate Judge who decided in favour of the appellants and the High Court, by whom his judgment in this respect was reversed. The

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nature of the points involved will be best understood after a statement of the relevant facts.

Lal Mohan Pal, who died on the 23rd February, 1891, originally carried on business with one Paju Lal in the sale of yarns and cloths. This business ended in 1882, and therefrom Lal Mohan Pal started a similar business, the head office being at Dacca, with branch places of business at Calcutta and elsewhere. He was, in this business, assisted by his three sons, Madan Mohan Pal, Jaga Mohan Pal, and Radha Gobinda Pal. After the death of Lal Mohan Pal this business was carried on by the three sons jointly as a joint family business, and Madan Mohan Pal asserted that the original capital of the business was largely composed of monies, amounting to Rs. 16,000 and upwards, due to him for services rendered to the original firm. The third son, Radha Gobinda Pal, died on the 1st November, 1902, having made a will, of which he appointed his brother, Jaga Mohan Pal, as the executor. He had no sons living at the date of his will or of his death, and only one wife Kusum Kumari, who survived him. He conferred upon his wife the power to adopt a son, and provided that if a son was adopted and died within fifteen years unmarried or childless, his wife should adopt another son, and if he died in similar conditions she should adopt a third. He gave his wife the yearly profits of all his immovable property, except certain monthly allowances in favour of his daughter, such profits to be received by her till the adopted son should attain twenty-one years, and thereafter one-half of the profit was to be received by his wife and one-half by the son. After the death of the wife all the immovable property was to go to the adopted son, with the provision that until such son had attained twenty one the estate should remain in the hands of his executor. He gave all his movable property or karbar to Jaga Mohan Pal, and directed that after realising the debts of the karbar he should pay out of the balance Rs. 2,000 to his wife for performing meritorious acts, Rs. 500 to his spiritual preceptor, Rs. 2,000 to the idol Iswar Radha Syamsunder Jiu, and Rs. 600 to his three sisters and such sum as would accrue as profit on the investment of Rs. 2,500 for charitable purposes. He died in 1902 and probate of the will was granted to the executor. A dispute subsequently arose between Jaga Mohan Pal, the executor, and Madan Mohan Pal the eldest son of Lal Mohan Pal. This dispute was due to the assertion by Madan Mohan Pal that he had originally contributed to the business Rs. 16,942 in his father's lifetime, and this he claimed as his share in the original joint capital of the business. This was finally

settled by the defendant abandoning his claim, and both he and Jaga Mohan gave up their intention of opening separate business and the joint business was continued.

Following upon this, Madan Mohan Pal gave his third son, Jadu Nath Pal, in adoption to his brother Jaga Mohan Pal; and the fourth son, Preonath Pal, as adopted son to the wife of Radha Gobinda Pal. Jadu Nath Pal died in December, 1906 and following upon his death a breach occurred in the family so that Madan Mohan Pal took his meals separately, gave notice to the defendants dissolving the joint family business, and finally instituted the suit out of which this appeal has arisen, claiming that he was entitled on partition to a two-thirds share of the joint properties, the movables and the business.

The property in respect of which this claim was made was separated under a variety of heads, but all that need now be considered were those that were contained in schedule 3 and schedule 5 (kha). The first included immovable property that had been acquired after Radha Gobinda's death, and the second, investments, Government paper, and houses. In respect of these the Subordinate Judge gave the plaintiff only one-third and the High Court two-thirds, the present appeal being brought by the widow and Preonath, claiming that a one-third was all that he was entitled to obtain.

The real question for determination, therefore, is whether these properties were acquired under circumstances which made them part of the joint family estate in which the widow and the adopted son were entitled to a one-third, or whether they belonged to the business which, after the death of Radha Gobinda, was owned as to two-thirds by the plaintiff and one-third by Radha Mohan. It is important to remember that the parties are governed by the Daya-bhaga law by virtue of which it was possible for the deceased brother to make a valid bequest of his share, but except to the extent to which that will affected the joint family it remained joint, with the result that, apart from the business, the immovables and all the property not actually included in the gift to Jaga Mohan Pal was joint family property. The business was, of course, under the control of the two elder brothers, and it appears that from the date of the death of the third brother no alteration whatever was made in the way in which the accounts were kept. The payments in respect of obtaining the probate of the will, which though not great in extent are several in number, were all made out of the business accounts. The payment of the monies for the probate itself was made in the same manner; but the legacy of Rs. 2,000 to the widow, and the

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like legacy to her as Shebait of the idols, remained unpaid. The income received from the real estate was all through shown under separate heads and nowhere distinguished as between the business and the joint estate, and although it is said that the income from the latter was only Rs. 1,100 a year, yet none the less it was all treated in the same way.

It is quite true, as has been pointed out, that having regard to the nature of the items being carefully specified, both in respect of receipt and payment, it would have been possible to have prepared from the books a further account showing how the respective estates stood in relation to each other, and it is also said that the actual monies paid to the widow and the adopted son exceeded the amount of their interest in the joint estate of which they were members; while finally, and this is perhaps the strongest point of all, the method of blending the two sets of items was continued by Rajnikanta, even after the dispute had begun. These circumstances all deserve consideration, but their Lordships do not think that they have sufficient weight to displace the general presumption that arises when members of a joint family, who have control over the joint estate, blend that estate with property in which they have separate interests.

In a case before this Board, *Suraj Narain v. Ratun Lal* (1) it was pointed out that the effect in such transactions was to cause the whole property to become joint, and the only real distinction that can be drawn between that case and the present is that there separate estate was brought into a joint family account instead of as in this case the joint family property being brought into the separate accounts. Their Lordships are unable to see that this distinction is sufficient to defeat the appellant's claim. The real question for determination is what is the true conclusion to be drawn when people united, as the present parties were, by bonds of close relationship and living as a joint family, draw for the joint family expenses out of a fund enriched by other contributions. They think that the result is accurately stated by the Subordinate Judge, in the following words:—

"If the members of a joint Hindu family confuse the incomes of their joint properties with their separate properties, their intention presumably is that the properties acquired with such mixed-up funds are for the benefit of the joint family. It should be noticed that not only these acquisitions and improvements made in this case with the amalgamated and confused funds, but the incomes arising from such

(1) (1916-17) L. R. 44 I. A. 201; I. L. R. 40 All. 159.

acquisitions and improvements were again partly spent also for joint family expenses and purposes, and the balances were again mixed up and confused from year to year to acquire properties and make improvements."

Indeed, the fact urged on behalf of the respondents that the joint family expenses exceeded all the property which, according to their contentions, was properly joint, in their Lordships' opinion tells against the respondents instead of in their favour. They think, therefore, that the decree of the High Court should be varied by providing that of the items 1-3 in Schedule 5 (*kha*) the plaintiff gets only one-third as also in Schedule 3, and that the provision in the said decree for payment of interest on the sum of Rs. 4,000 be omitted. The cross-appeal will be dismissed. The appellants are entitled to their costs of these appeals, but their Lordships will not vary the order as to costs in the High Court, and they will humbly advise His Majesty to this effect.

W. W. Box & Co. : Solicitors for the Appellants.

Hy. S. L. Polak : Solicitor for Respondent.

K. V. L. N.

Appeal allowed.

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APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Chotzner.

MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR

v.

TRAILAKHYA NATH ROY AND OTHERS.*

CIVIL.

1922.

May, 3.

Appeal—Bengal Tenancy Act (VIII of 1885), Sec. 153.—Liability to pay cess—Publication under the Bengal Cess Act.

No appeal lies from the decree of the District Judge deciding the question of the liability of the defendant to pay cess when the plaintiff has not published the notice contemplated by the Bengal Cess Act: *Mohesh v Umatara* (1) and

*Appeal from Appellate Decrees Nos. 1077 to 1079 and 1091 to 1117 of 1920.

(1) (1889) I. L. R. 16 Calc. 638.

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Rajani v. Jaggeswar (1) followed. *Watson & Co. v. Sreekristo* (2) and *Debendra v. Puresh* (3) distinguished.

Appeals by the Plaintiff.

Suits for recovery of cesses.

The material facts appear from the judgment.

Babus Mohendra Nath Ray, Gobinda Chandra Dey Roy, Romes Chandra Sen and Birendra Chandra Das for the Appellant.

Babu Sasadhar Roy (Sr.) for the Respondents in Appeals Nos. 1084, 1085 and 1090.

Babu Upendra Kumar Roy for the Respondents in Appeals Nos. 1085, 1088 and 1103.

Babu Biraj Mohan Majumdar for the Respondents in Appeals Nos. 1093 and 1115.

Babu Jotir Mohan Bhattacharjee for the Respondents in Appeals Nos. 1110 and 1115.

The judgment of the Court was delivered by

May, 23.

Mookerjee J. :— These forty appeals arise out of as many suits for recovery of cesses due to the plaintiff on account of rent free lands within his estate. The Subordinate Judge has dismissed the suits on the ground that the plaintiff was not entitled to realise cesses from the tenant defendants, as he had not served the notices contemplated by section 54 of the Bengal Cess Act. The contention of the appellant is that this view is erroneous in law.

A preliminary objection has been taken on behalf of the respondents on the ground that the appeals are incompetent under section 153 Bengal Tenancy Act. That section bars a second appeal in suits for rent where the decree is passed by a District Judge, Additional District Judge or Subordinate Judge and the amount claimed in the suit does not exceed Rs. 100 unless a question of a special character has been decided by the decree under appeal. The contention of the respondents is that this provision read with section 47 of the Cess Act renders all the appeals incompetent. In support of this position they have placed reliance upon the decisions in *Mohesh Chunder Chattopadhyaya v. Umataru Deby* (4), and *Rajani Kant Nag v. Jaggeswar Singh* (1).

(1) (1892) 1 L. R. 20 Calc. 254.

(2) (1893) 1 L. R. 21 Calc. 132.

(3) (1906) 4 C. L. J. 119.

(4) (1889) 1 L. R. 16 Calc. 638.

On behalf of the appellant, reliance has been placed on the other hand upon the decision in *Watson & Coy. v. Sreekrishna Bhummick* (1) and *Debendra Prosad Ghose v. Parash Nath Mitter* (2). In our opinion the cases mentioned on behalf of the appellants are distinguishable. The appeals in *Mohesh Chunder Chattopadhyaya v. Umatara Deby* (3) and *Rajani Kant Nag v. Jageshwar Singh* (4) arose out of suits instituted for recovery of Cess only. There was no question in either case as to the amount of cess annually payable but there was a question as to the liability to pay Cess, and it was ruled that the appeal was barred under section 153 inasmuch as the decree which was assailed had not decided a question relating to the amount of Cess annually payable by the tenant. On the other hand, the decisions in *Watson & Coy. v. Sreekrishna Bhummick* (1) and *Debendra Prosad Ghose v. Parash Nath Mitter* (2) were pronounced in suits instituted for the recovery of rent and cess. There was no question as to the amount of cess annually payable, but there was a question as to the liability to pay cesses. It is plain that the effect of the decision of the question of liability to pay cess would be to affect the amount of "rent" annually payable by the tenant, if the word 'rent' is interpreted to mean not only rent properly so called but also cesses recoverable as rent; see section 3(5) of the Bengal Tenancy Act and section 47 of the Cess Act. The appeals now before us arise out of suits instituted for the recovery of cesses only. Consequently the present appeals are governed, not by the decisions in *Debendra Prosad Ghose v. Parash Nath Mitter* (2) and *Watson & Coy. v. Sreekrishna Bhummick* (1) but by the decision in *Mohesh Chunder Chattopadhyaya v. Umatara Deby* (3) and *Rajani Kant Nag v. Jageshwar Singh* (4). The decree under appeal in each of these cases has decided the question, not of the amount of cesses annually payable but of the liability of the defendant to pay cess when the plaintiff has not published the notices contemplated by the Bengal Cess Act. We are consequently of opinion that the preliminary objection must prevail in each case and that the appeals should be dismissed, with costs where the respondent has entered appearance.

A. T. M.

Appeals dismissed

(1) (1893) I. L. R. 21 Calc. 132.

(2) (1906) 4 C. L. J. 119.

(3) (1889) I. L. R. 16 Calc. 638.

(4) (1892) I. L. R. 20 Calc. 254.

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Mookerjee, J.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Chotanar.

CIVIL.

1922.

April, 25.

GIRIS CHANDRA BHATTACHARYYA AND ANOTHER

v.

BHABATARAN SHAKARI AND ANOTHER.*

Ejectment—Bengal Tenancy Act (VIII of 1885), section 18a—Part of homestead used for keeping agricultural cattle.

A part of homestead used by a settled raiyat for keeping agricultural cattle, is governed by section 18a of the Bengal Tenancy Act.

A homestead land is used for agricultural purposes, if a raiyat keeps agricultural cattle on a part of it: *Dina Nath v. Sashi* (1).

Appeal by the Plaintiffs.

Suit for ejectment.

The material facts appear from the judgment.

Babus Surendra Chandra Sen and Hemendra Chandra Sen for the Appellants.

Babus Tarak Chunder Chuckerbutty and Prafulla Chunder Chuckerbutty for the Respondents.

The judgment of the Court was delivered by

April, 25.

Mookerjee J.—This is an appeal by the plaintiffs in a suit for ejectment. The plaintiffs served a notice upon the defendant to quit at the end of the then current Bengali year. Notwithstanding this, the defendant remained in occupation. The case for the defendant is that the incidents of the disputed land are governed by the provisions of the Bengal Tenancy Act and that consequently he is not liable to be ejected. The primary Court held that the land was not agricultural in character and was governed by the provisions of the Transfer of Property Act. In this view the Court of first instance decreed the suit, as the tenancy was capable of termination and had been terminated by a legal notice to quit. On appeal the District Judge has dismissed the suit as in his opinion the tenancy was governed by the Bengal Tenancy Act and could not be terminated. We are of opinion that the view taken by the District Judge is manifestly right.

* Appeal from Appellate Decree No. 563 of 1920, against the decree of B. N. Ran Esq., District Judge of Murshidabad, dated the 3rd December, 1919, reversing that of Babu Jyoti Prasad Banerjee, Munsif of Kandi, dated the 22nd July, 1918.

(1) (1915) 22 C. L. J. 219; 20 C. W. N. 550.

The plaintiffs are on the horns of a dilemma. The defendant has been found to be a settled raiyat of the village where the disputed land is situated. He has also been found to have lands under cultivation; he gets these lands cultivated by hired labourers whom he supplies with his own cattle and ploughs. He has also his granary and khamar within his own homestead. In these circumstances it is plain that as the defendant is a raiyat, the disputed land is governed either by section 182 or by the other provisions of the Bengal Tenancy Act. Whichever view is adopted, the plaintiffs are out of Court.

No doubt, as the appellant has contended, it cannot be maintained that because a settled raiyat takes settlement of a piece of land, adjacent to his homestead though for purposes not agricultural, the tenancy of the new plot of land is governed by section 182 of the Bengal Tenancy Act. Here, however, the land is used either as a homestead by a raiyat or for agricultural purposes. As the District Judge has correctly pointed out a raiyat often keeps his cattle on a part of his homestead, and this makes section 182 applicable. On the other hand, if we hold that this land does not form a part of the homestead of the raiyat, it is manifestly used for agricultural purposes, because the raiyat keeps here cattle used for the purpose of agriculture. This view is in accord with that adopted in the case of *Dina Nath Nag v. Sashi Mohan Dey Tarafdar* (1). We hold accordingly that the tenancy of the defendant in respect of the disputed land was not terminable and had not been terminated by the notice to quit.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed

(1) (1915) 22 C. L. J. 219; 20 C. W. N. 550.

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CRIMINAL REVISION

Before Mr. Justice Newbould, Mr. Justice Sukrawardy, and
Mr. Justice Buckland.

PRIYA NATH GUPTA

v.

LALJI.*

Criminal intimidation—Penal Code (Act XLV of 1860), Sec. 503—Threat to property—Effect on person threatened.

Per Newbould and Buckland JJ. (Sukrawardy J. Contra).—A notice signed by the petitioner and issued under his authority as President of the *Salisi Nispathi Mandal* was served on the complainant. In this notice, it was stated that a certain person filed a claim for certain amount against the complainant who was informed that he should appear before the Court and settle the claim. The notice concluded thus: "If the defendant do not answer the claim on the date fixed the claim will be decreed *ex parte* on the evidence of the plaintiff. No objections will be entertained after the passing of such an *ex parte* decree."

Held, that the petitioner threatened the complainant with harm to be caused illegally and hence committed the offence of criminal intimidation.

Under section 503 of the Indian Penal Code, the capacity of the person making the threat to carry it into execution is not needed.

Per Sukrawardy, J. : The elements constituting the offence of criminal intimidation under section 503 of the Indian Penal Code are, first, threat of injury to the property of the complainant, and, secondly, the intention to cause alarm. The threat must be a direct threat to cause harm to a person in property and not by way of the insinuation of possibility or even probability of such harm.

The mental condition of the complainant does not determine the offence of criminal intimidation: It is the mental attitude of the accused or *mens rea* that ordinarily makes an act criminal.

Per Buckland J. : Section 503 does not say anything about the effect upon the person threatened.

Application for Revision by the Accused under section 435 of the Code of Criminal Procedure.

The petitioner was convicted by the Sub-divisional Magistrate under section 506 Indian Penal Code and sentenced to pay a fine of Rs. 200 or in default to undergo six months simple imprisonment by the following judgment :

*Criminal Revision No. 1022 of 1922, against the order of P. C. De Esq., Sessions Judge of Dacca, dated the 16th September, 1922, affirming that of Mr. R. H. Hutchings, Sub-Divisional Magistrate of Manikganj, dated the 12th August, 1922.

In this case the prosecution alleged that the accused Priyanath Gupta, styling himself President of the Arbitration Court, uttered a threat against Lalji Chowkidar by causing the notice Exhibit I to be served upon him and committed thereby the offence made punishable under section 506 Indian Penal Code.

The defence admit that the signature on Exhibit I is that of the accused and that the printed portion of the notice was issued by his authority and over his signature. The accused denies that the portion in handwriting comprising the last two sentences and beginning with "आज्ञा" ending in "न" was issued by his authority. The prosecution evidence is to my mind conclusive that the notice Exhibit I signed by the accused was actually received by Lalji and served upon him by a peon of the Arbitration Court. The man is quite consistent in complaint and upon examination and he is corroborated by the President's original report Exhibit 2, the evidence of P. W. 2 and 3. This evidence is unshaken by the defence and I do not think they dispute that the notice was served in the manner alleged by the complainant either by evidence or in the argument of the learned counsel for the defence.

The points for decision therefore seem to me to be.

(1) Whether any and if so what portions of the notice Exhibit 1 amount to a threat within the meaning of section 506 Indian Penal Code read with section 503 Indian Penal Code.

(2) Whether such threat was issued or uttered by the accused.

(3) The intention of the accused in uttering the threat if any.

In considering my first point I will deal generally with the Exhibit 1 at the outset.

After considering the evidence I find the accused Priyanath Gupta guilty of an offence punishable under sections 506 of the Indian Penal Code and I sentence him to pay a fine of Rs. 200 under sections 506 Indian Penal Code and in default to suffer simple imprisonment for six months under section 65 Indian Penal Code.

This judgment was affirmed on appeal by the Sessions Judge.

The accused then moved the High Court. The Rule came on for hearing before Mr. Justice Newbould and Mr. Justice Suhrawardy, who differed in their opinion and passed the following judgments:

Newbould J.:—The petitioner Priyanath Gupta was convicted by the Sub-Divisional Magistrate of Manikganj of an offence punishable under section 506 Indian Penal Code and sentenced to pay a fine of Rs. 200 or in default to undergo six months' simple

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imprisonment. This conviction and sentence were confirmed on appeal by the Sessions Judge of Dacca. The petitioner has obtained a rule calling on the District Magistrate to show cause why the conviction and sentence should not be set aside on the following two grounds only.

1. For that the facts proved and found cannot legally constitute the offence of criminal intimidation.

2. For that the prosecution having neither alleged nor adduced any evidence to show that any decree passed by the Arbitration Court was ever sought to be enforced against the will of the person against whom the same was passed by any means whatever, the Courts below should have held that an *ex parte* decree of the said Arbitration Court against the opposite party would be perfectly innocuous and that as such the possibility of such a decree could not constitute a threat of injury within the meaning of section 503 Indian Penal Code. These two grounds are really one and the same, the second ground setting out in detail the argument on which the first ground is based.

The following are the facts proved and found in this case. The petitioner is the President of what is known as the Arbitration Court or Gandhi Maharajake Court at Manikganj. A notice Exhibit 1 partly printed and partly written signed by the petitioner and issued under his authority as President of this Court was served on the complainant Lalji, a village chaukidar. In this notice it is stated that one Gobin Bhar has filed a claim for Rs. 2499 against Lalji who is informed that he should appear before the Court and settle the claim. The notice concludes with the two following statements:

"If the defendant do not answer the claim on the date fixed the claim will be decreed *ex parte* on the evidence of the plaintiff. No objections will be entertained after the passing of such an *ex parte* decree. Lalji was frightened by this notice and consulted the Panchayet who reported the facts to the Magistrate.

Criminal intimidation which is punishable under section 506 is defined in section 503 Indian Penal Code as follows: "Whoever threatens another with any injury to his person, reputation or property . . . with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat commits criminal intimidation."

The only question of any difficulty in this case is whether the concluding portion of Exhibit I was a threat of injury to the property of Lalji. If it was such a threat there can be no doubt

that the criminal intent which is the other ingredient of the offence of criminal intimidation has been established. It is found as a fact that this notice did cause alarm to Lalji. Such a result is a natural consequence of threat which the person who threatened must be presumed to have intended. I also hold that the inference has been rightly drawn that it was the intention of the petitioner because Lalji was to do an act which he was not legally bound to do, namely to appear before the arbitration Court, as the means of avoiding the execution of the threat (if it is held to be a threat) that an *ex parte* decree would be passed against him. On a full consideration I hold that the lower Courts were right in deciding that the statement that a claim for Rs. 2499 would be decreed *ex parte* against Lalji if he did not answer the claim on the date fixed, amounted to a threat of injury to his property. The learned Sessions Judge has compared the petitioners' action to that of a bully who threatens to shoot a person though he has no license to carry fire arms. To my mind a better comparison would be that of a person who holds an unloaded pistol at the head of another. The fact that the pistol was unloaded would be no defence to a charge of criminal intimidation if the person threatened was ignorant of this fact. The use of the word decree in the notice implies that an order passed by the arbitration Court would be enforced. Though the Court had no legal power to enforce its decree a person in the position of Lalji would naturally fear that it would be enforced by illegal methods. I can see no force in the contention based on the fact that no *ex parte* decree of the arbitration Court has ever been enforced. Evidence was taken about two months after the issue of the notice. The omission to take any action to enforce *ex parte* decrees during that period may have been due to this prosecution or other causes. It has not been shown that at the time the notice was issued Lalji had reason to believe that no steps would be taken to enforce a so-called decree against him.

I would therefore hold that the facts proved and found legally constitute the offence of criminal intimidation and would discharge this rule.

I regret that I am unable to agree with my learned brother. The case will be submitted to the Chief Justice for the appointment of another judge under section 429 read with section 439 Criminal Procedure Code.

Suhrawardy, J : The accused has been convicted in this case under section 506 Indian Penal Code and sentenced to pay a fine of Rs. 200 in default six months' simple imprisonment. The

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charge against him is that as president of a self constituted arbitration Court styled in the notice referred to hereafter as Manikganj Arbitration Assembly the accused caused a notice to be issued over his signature to the complaint and thereby committed an offence under section 506 Indian Penal Code. The notice complained of states that a certain person (name given) has laid a claim against the complainant for Rs. 2499—here follow details of the claim—before the Arbitration Assembly and as recourse to Court would be ruinous to both sides, he is requested to be present on a given date and arrange for amicable settlement. These words are in print. Then follow the words in manuscript which are said to be the offending words constituting criminal intimidation. They are : "Be it known that if the defendant (meaning the complainant in this case), does not give an answer (or file written statement) on that date the suit will be decreed on that date on plaintiff's (i.e. accused's) proof. Afterwards no objection will be accepted."

The accused has obtained this Rule on the ground that the facts proved and found do not legally constitute the offence of Criminal intimidation. The Crown does not appear to support the conviction but the trial Magistrate has submitted a full explanation.

It therefore remains to be considered if the words in writing quoted above make out the offence of which the accused has been convicted for it is evident that the printed portion of the notice is wholly innocuous.

The charge framed is in these words:—That you caused a written notice to be served on one Lalji Chaukidar of Gheor and thereby caused him alarm for his property intending thereby to cause him to appear before you on a certain date and place which you had no right to do and which he was not legally bound to obey and thereby committed an offence punishable under section 506 &c. &c. I think this charge is bad. Section 503 Indian Penal Code defines Criminal intimidation thus :—(I quote so much of the section as is necessary for our present purpose) whoever threatens another with any injury to his . . . property . . . with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do, as the means of avoiding such threat, commits Criminal intimidation.

It is clear from this definition that the elements constituting the offence are *first*, threat of injury to the property of the complainant and *secondly*, the intention to cause alarm.

As to the first element it is said by the learned Additional

Sessions Judge who heard the appeal that the expression that if the complainant did not appear on the day fixed an *ex parte* decree will be passed against him is threat to his property. I am unable to agree in this view. Injury is defined in section 44 Indian Penal Code as 'denoting any harm whatever illegally caused to any person in property.' Hence the threat must be causing harm to property. I cannot persuade myself that the threat to pass an *ex parte* decree for a certain sum by an unauthorised person or body is threat to property. This apparently strained construction of the plain wording of the law is sought to be vindicated by suggesting that the accused or the body to which he belongs might thereafter proceed to touch the complainant's property on the strength of that decree. This is mere conjecture. Had there been any evidence that the accused ever proceeded against another property under colour of a so-called decree, it might be urged, I do not decide, rightly that the threat involved subsequent injury to property. The evidence is just the other way for P. W. 3 Ch. Mohun Majumdar says—I have never seen any decree of the arbitration Court being executed. As I read section 503 Indian Penal Code, the threat must be a direct threat to cause harm to a person in property and not by way of insinuation of possibility or even probability of such harm.

As regards the second ingredient of the offence, the accused is not charged with having the intention to cause alarm to the complainant, nor is there any such finding. The learned Additional Sessions Judge finds that the complainant, a person of ordinary intelligence and education was in fact frightened. This is not enough. The mental condition of the complainant does not determine the offence. It is the mental attitude of the accused or *mens rea* that ordinarily makes an act Criminal. It may be said that the accused intended to cause the complainant to do an act which he was not legally bound to do viz., to file an answer, but the threat must be to cause injury to property in the event of non-compliance.

For all these reasons I hold that the conviction is bad and must be set aside and the accused acquitted.

On account of this difference, the case was heard by Mr. Justice Buckland.

Babus Narendra Kumar Bose and *Bimal Chunder Das Gupta* for the Petitioner.

Mr. Orr. for the Crown.

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Buckland J: The petitioner Priyanath Gupta who was convicted by the Sub-Divisional Magistrate, Manikganj, of the offence of Criminal intimidation and sentenced to pay a fine of Rupees two hundred or in default to undergo six months simple imprisonment appealed to the Sessions Judge of Dacca by whom the conviction and sentence were confirmed and has now obtained a Rule from this Court to show cause why the conviction and sentence should not be set aside. The case has been laid before me under sections 429, 439 of the Code of Criminal Procedure.

The complainant is one Lalji Koeri, a Chowkidar. There was served on him by a peon a document in the following terms :—

Notice for decision of suit.

Before the (Body of) Arbitrators at Manikganj District Dacca.

Civil Suit, No. 595 of 1328-29.

Claim laid at "S" 2499'—

To

5 Lalji Koeri, father's name not known of Gheor Bazar Defendant.

Whereas the Plaintiff Gobin Bhar, son of the late Jhiguri Bhar of Pechar, Kandarhat, Thana Gheor, has brought a suit against you on the allegation that the defendants Nos : 2 to 6 have kept, confined the Plaintiff's married wife, Parbati and the other Defendants are in collusion with them, that the Plaintiff at the time of his going to Benares had entrusted the defendants with the charge of his shop and that the defendant have misappropriated many articles of the said shop and has prayed for the recovery of possession of those articles and of his wife under the decision of Salisi Nispatti Mandali (Body of Arbitrators) at Manikganj and whereas if a case be brought in Court in respect of the said matters there is likelihood of a heavy loss being suffered by both the parties, you are hereby informed that you will appear before me at 10 a. m. on Thursday the 11th Jaistha next and make arrangement for an amicable settlement thereof otherwise you will be put to loss for nothing.

Be it mentioned here, that if the defendants do not put in an answer on the aforesaid date the suit will be decreed on the evidence of the plaintiff and no objection will be allowed thereafter.

Manikganj	File	
Salisi Bichar	(Initials)	Priyanath Gupta
Mandali	23.6	President.
Rastriya Samiti	On the back	Salisi Nispathi Mandali

List of property			
1. Har Magan Bhadai	...	Cash	Rs. 64
2. Taken by Gabari	...	"	" 500
3. On account of ornaments	...	"	" 30
4. Mangal Karmakar Ghatak	...	"	" 1000
5. Gold Mohur 1	...	"	" 30
6. Gobind Bhar on account of shop	...	"	" 425
7. Guru Prosad on account of shop	...	"	" 450
Total			Rs. 2499

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Portions of this document are in print, the remainder is in manuscript, in particular the last paragraph from the words "Be it mentioned" to "allowed thereafter." The petitioner whose signature it bears is the President of what is known as the Salisi Nispatti Bichar Mandali at Manikganj, and the charge is that by causing it to be served upon the complainant he committed the offence of which he was convicted.

Two points have been argued upon the hearing of the Rule. The first is that there is no evidence to support the findings of the lower Courts that the last paragraph in manuscript was there when the petitioner signed the notice as to which I am not prepared to hold that there is no evidence to support the inference which the lower Courts have drawn in this respect.

The other point which is more substantial is that this notice can not constitute the offence charged.

Excluding immaterial portions of the section criminal intimidation is defined as follows:—Whoever threatens another with any injury to his person, reputation or property.....with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do.....as the means of avoiding the execution of such threat commits criminal intimidation.

That the notice in question conforms in many respects to the forms used by Courts established by law does not admit of dispute. Expressions used are similar, the word "suit" is employed to specify the proceedings before this Tribunal which was self-constituted and had no legal sanction, and the complainant is required to put in an answer which he was not legally bound to do, as the means of avoiding that "the suit will be decreed on the evidence of the plaintiff," which fulfils the requirements of the section as regards intent.

The question then arises whether that which according to the notice the complainant could so avoid was injury threatened to his

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person, reputation or property. That a decree of a Civil Court harms an individual against whom it is made in his person, reputation or property is a proposition which was not controverted when I put the question to the learned Vakil for the applicant in the course of argument and in my opinion he rightly accepted it as correct, though it might be more strictly accurate to say that the harm is caused by the probable legal consequences of a decree. Consequently a threat of a decree is a threat of harm to an individual in his person, reputation or property.

But it is submitted that this notice cannot be construed as a threat of such harm as the tribunal was incompetent to execute its decree. That in my judgment is immaterial. The section says nothing about the capacity of the person making the threat to carry it into execution. Were such capacity essential, the threat implied in the presentation of an unloaded pistol at the head of another would not further the commission of the offence of criminal intimidation unless the act was accompanied by threatening words, which would reduce the section to an absurdity. Nor does the section say anything about the effect upon the person threatened, and whether or not the complainant knew that the notice was innocuous is equally immaterial.

Looking at the notice as a whole the only inference to be drawn is that it was the intention of the petitioner to cause the complainant to think or believe that unless he did what the notice required him to do a decree as ordinarily understood would be passed against him and he would become liable to those penalties which are the sanctions for decrees made by courts of justice duly constituted by law. No other intention can be attributed to the use of the forms of expression and words employed. The petitioner therefore threatened the complainant with harm in his person, reputation or property by threatening him with a decree. Under section 44 of the Indian Penal Code injury denotes harm illegally caused. By no legal process or means could this Tribunal make or give effect to such decree as it was the intention of the notice to cause the complainant to believe would be made if he failed to comply with it. Therefore in that the petitioner threatened the complainant with such decree, he threatened the complainant with harm to be caused illegally.

Upon the facts found by the lower Courts I hold that the petitioner committed the offence of criminal intimidation. The conviction and sentence are affirmed and the Rule is discharged.

A. T. M.

Rule discharged.

Before Mr. Justice Newbould, and Mr. Justice Sukrawardy.

KRISHNA CHANDRA BHOWMIK

v.

EMPEROR.*

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1923.

March, 9.

Contempt of Court—Criminal Procedure Code (Act V of 1898), Sec. 481—“If any”

In a prosecution for contempt of Court against a legal practitioner, he was not called upon to make a statement and no statement was recorded:

Held, that this defect in the procedure was fatal.

No person can be punished for contempt of Court which is a criminal offence unless the specific offence charged against him be distinctly stated and an opportunity given him of answering: *In re Edward Hutchinson Pollard* (1).

The expression ‘if any’ in section 481 of the Code of Criminal Procedure indicates that the Court cannot compel the accused to make a statement, but it does not mean that it should not give him an opportunity to make a statement.

Application for Revision by the Accused under section 435 of the Code of Criminal Procedure.

The petitioner was convicted under section 228 Indian Penal Code and sentenced to pay a fine of Rs. 50 or, in default, one month’s simple imprisonment.

The material facts appear from the following judgment of the lower appellate Court:

This appeal arises out of a contempt of Court proceeding. It was the prosecution case that while the complaining Court was engaged at a stage of judicial proceeding the appellant who is a Muktear of some standing offered him an intentional insult by uttering the words “I shall bring a defamation suit against you.”

The case for the muktear is that as the Court called him a liar he uttered the words “I may bring a defamation case against you.”

The proceeding would show that the words used by the Court were “what my bench clerk says is all right what you say is not true.”

It appears that the unhappy incident took place in this way. In a case by one Jhuri Bewa against Henraj Pramanik under section

* Criminal Revision No. 69 of 1923, against the order of Girish Chandra Sen Esq, Sessions Judge of Pabna, dated the 15th December, 1922, affirming that of Babu C. L. Mukerjee, Sub-Divisional Magistrate of Pabna, dated the 11th November, 1922.

(1) (1868) L. R. 2 P. C. 106.

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323 of the Indian Penal Code the Court ordered a summons to issue on the accused on the 27th of October 1922. According to the practice of the Court the necessary talabana was to be put in within 5th day of the order. The Court was closed for the 28th, 29th or 30th and re-opened on the 31st October. The talabana was put in on the 1st of December and not on the 31st October as it ought to have been done, so the summons was not issued. On the next hearing date that is on the 11th November the appellant put in a petition praying for time. The prayer was actually allowed as the appellant represented that the process fee was put in time as the Court was re-opened on the 31st and not on the 1st of the following month. This statement of the muktear was certainly inaccurate and could be justified on the ground that it was made under a bonafide mistake. The Court naturally relied on the muktear and asked the Bench clerk why the process was not issued though process fee was put in time as the Court re-opened on the 31st October. The statement of the bench clerk was resented by the appellant and he persisted in saying that he was in time as the Court re-opened on the 1st November. This resentment was not at all justified on the part of the appellant. His persistence in this statement that the Court was closed on the 31st and that he paid the process fee in time was all the more unjustifiable after the inaccuracy had been detected. When inaccurate statement is persisted on after its inaccuracy has been detected, the statement may well be characterised as a lie though a Court of Justice should be very cautious in using such a strong language. It is very desirable that officers exercising Judicial functions should measure every word they utter and that they should have full control over their tongues. When the appellant persisted in his inaccurate statement the Court observed "what you say is untrue my bench clerk is right. If that was so the Court was perfectly justified. The appellant's version is however different. He says that when the inaccuracy was detected the observation of the Court was that he was a liar. If muktear's version be accepted the Court's conduct was surely undignified though not wholly unjustified. I however accept the Court's version of the affair as true in preference to that given by the muktear. In any view of the case the appellant's conduct was unjustified and reprehensible. As he persisted in an inaccuracy even when it was detected he provoked the remark whatever it was and he ought not to have retaliated as he had done. He really intimidated the presiding officer in an open Court and intentionally insulted him in open Court before the litigant public. He not only com-

mitted a contempt of Court but was guilty of unprofessional conduct.

Against this decision the petitioner moved the High Court.

Babus Dasarathi Sanyal, Nagendra Nath Bose, Dinsh Chandra Roy and Hemendra Nath Bose for the Petitioner.

Babu Satindra Nath Mukherjee for the Crown.

The following judgment was delivered :

The petitioner in this case is a muktair practising in the Criminal and Revenue Courts in Pabna. He has been convicted of contempt of Court by the Sub-Divisional Magistrate of Pabna and under section 228 Indian Penal Code sentenced to pay a fine of 50 Rupees. This conviction was upheld on appeal by the Sessions Judge of Pabna.

This Rule was granted on the ground that the order passed by the Magistrate was illegal and without jurisdiction inasmuch as the petitioner was not called on to make a statement and no statement was as a matter of fact recorded as required by section 481 Criminal Procedure Code. In dealing with this point the learned Sessions Judge remarked in his judgment that :—" The fundamental principle of criminal jurisprudence that a man must be heard before he is condemned has no application in such cases where special procedure has been provided by express law." With this expression of law we are in entire disagreement. The point has been considered by the Judicial Committee of the Privy Council in the case of *In re Edward Hutchinson Pollard* (1). Their Lordships stated that in their judgment no person can be punished for contempt of Court which is a criminal offence unless the specific offence charged against him be distinctly stated and an opportunity given him of answering this case was decided in 1868 and the same principle was affirmed by their Lordships of the Judicial Committee in a more recent case of *Chan Hang Kiu* (2). We are unable to accept the contention of the learned vakil who shows cause against the Rule that the words "if any" in section 481 Criminal Procedure Code shows that in the special procedure provided by this section an exception to this general rule is provided. All that the expression "if any" indicates is that the Court cannot compel the accused to make a statement, but it cannot mean that he should not give him an opportunity to make a statement. We hold that this defect in the procedure was fatal to the conviction and we must therefore set it aside.

(1) (1868) L. R. 2 P. C. 106.

(2) (1909) 13 C. W. N. 685.

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Before leaving this case we think we should express our opinion that we are in agreement with the learned Sessions Judge that the conduct of the petitioner was unjustified and reprehensible. We think it sufficient having regard to the facts of the case to confine ourselves to this expression of opinion and it is not necessary to direct any further proceedings to be taken against him in the matter. We make this Rule absolute and set aside the conviction and sentence passed on the petitioner, and direct that the fine if paid be refunded.

A. T. M.

Rule made absolute.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and

Mr. Justice Chotzner.

SARADAKRIPA LAL

v.

BEPIN CHANDRA PAL AND OTHERS*.

CIVIL.

1922.

July, 11.

Lease—Restrictive Covenant—Covenant running with land—Transfer of Property Act (IV of 1882), sections 10, 12—Liability of transferor to pay rent.

A permanent, heritable and transferable tenure (or *itmam* tenure) was created by a lease which contained a covenant to the effect that the tenant would, if he transferred the property, pay to the landlord, out of the purchase money in his hands, one-fourth as *Nasar*, and would obtain registration of the name of the transferee. The covenant further provided that if this step was not taken, the transfer would be invalid and the tenant would continue to be liable for the rent. After the grant of the lease, the lessee executed a mortgage in favour of the first defendant. Before the loan had been repaid, the lessee defaulted with the result that the landlord obtained a decree for arrears of rent and brought the tenure to sale. At this execution sale, the first defendant, the mortgagee, became the purchaser. Later on, the first defendant transferred the property purchased by him to the second defendant. In a suit for recovery of arrears of rent due,

Held, that the restrictive covenant in the lease was valid under sections 10 and

* Appeal from appellate decree No. 2048 of 1920, against the decree of Babu Gopal Das Ghose, Subordinate Judge of Chittagong, dated the 25th May, 1920, modifying that of Babu Nanigopal Mookerjee, Munsiff of Casim bazar, dated the 25th April, 1919.

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12 of the Transfer of Property Act and was operative as between the landlord and the tenant: *Abhiram v. Shyama Charan* (1).

That the covenant was one running with the land.

That the first defendant was liable to pay rent under the terms of the lease: *Rup Chand v. Narendra* (2)

That the decree for rent passed against the second defendant was allowed to stand, as he did not appeal against it.

The question whether the conveyance created a valid title in the second defendant as against the plaintiff was not considered.

A covenant is deemed to run with the land if it is of such a nature that it directly affects the use of the demised premises in a manner which the lessor thinks will be beneficial to him.

An express covenant not to transfer the land without the consent of the landlord is a covenant which sufficiently attaches to, and concerns, the demised premises, and consequently is a covenant running with the land: *Williams v. Barle* (3) and other cases.

That in this case, the restriction imposed upon the right of alienation of the tenant, was operative during the entire period of the subsistence of the lease.

Appeal by the Plaintiff.

Suit for rent.

The material facts appear from the judgment.

Babus Biraj Mohan Majumdar and Chandra Sekhar Sen for the Appellant

Babu Narendra Kumar Das for the Respondent.

The judgment of the Court was delivered by

Mookerjee J. :—This is an appeal by the plaintiff in a suit for rent instituted against two defendants. The Court of first instance decreed the claim against the first defendant alone. Upon appeal the lower Appellate Court has made the second defendant alone liable for arrears. On the present appeal, the plaintiff has contended that the first defendant also is liable for the rent due.

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The tenancy was created on the 23rd March, 1908, when a kabulyat was executed by the second defendant in favour of the plaintiff. The tenancy is described as an *iltam* and consequently on the authority of the decision in *Jogesh Chandra Roy v. Mahbul Ali* (4) it may be assumed that the tenancy was a permanent, heritable and transferable tenure. The lease contained a covenant to the effect

(1) (1909) L. R. 36 I. A. 148; I. L. R. 36 Calc. 1003.

(2) (1914) 1 C. W. N. 112.

(3) (1868) L. R. 3 Q. B. 739.

(4) (1920) I. L. R. 47 Calc. 979.

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that the tenant would, if he transferred the property, pay to the landlord, out of the purchase money in his hands, one-fourth as *nazar*, and would obtain registration of the name of the transferee. The covenant further provided that if this step was not taken, the transfer would be invalid and the tenant would continue to be liable for the rent. The provisions of sections 10 and 12 of the Transfer of Property Act make it abundantly clear that restrictive covenant of this description is valid when inserted in a lease between a landlord and his tenant. Reference may in this connection be made to the decision of the Judicial Committee in *Abhiram Goswami v. Shyama Charan Nandi* (1) which shows that a lessor, even when the lease is a permanent one, may, by apt words, prohibit alienation by the lessee and make a breach of this condition a condition for forfeiture of the lessee's interest. We must consequently proceed on the assumption that this covenant was valid and operative as between the landlord and the tenant.

After the grant of the lease, the lessee executed a mortgage in favour of the first defendant. Before the loan had been repaid, the lessee defaulted with the result that the landlord obtained a decree for arrears of rent and brought the tenure to sale. At the execution sale, the first defendant, the mortgagee, became the purchaser. On the 2nd April 1917, the first defendant transferred the property purchased by him to the second defendant. On the 24th April 1918 the plaintiff instituted this suit for recovery of arrears of rent due. The first defendant urged that he was no longer liable for the rent as he had transferred his interest in the tenancy to the second defendant. The plaintiff contended that the transfer was collusive. The Courts below have arrived at divergent conclusions. The trial Court held that the transfer was not genuine while the Court of appeal below has held that the transfer was genuine. We must consequently determine the liabilities of the parties on the assumption that the transaction was genuine.

The first question which requires consideration is whether the covenant in the lease was binding between the landlord and the original tenant only, or, whether it was a covenant running with the land and binding upon all holders of the tenancy during the entire period of the subsistence of the lease. In our opinion, the covenant is a covenant running with the land. As a general principle, a covenant is deemed to run with the land if it is of such a nature that it directly affects the use of the demised premises in a manner which the lessor thinks will be beneficial to him. It has been ruled

(1) (1909) L. R. 36 I. A. 148; I. L. R. 36 Calc. 1003; 10 C. L. J. 284.

that an express covenant not to transfer the land without the consent of the landlord is a covenant which sufficiently attaches, and concerns, the demised premises, and consequently is a covenant running with the land; *Williams v. Earle* (1); *McEacharn v. Cotton and others* (2), and *West v. Dobb* (3). There is no doubt in this case that the landlord must have intended that the restriction he imposed upon the right of alienation of the tenant, would be operative during the entire period of the subsistence of the lease. The lease was permanent and there is no reason why the landlord should have covenanted for payment of Chouth only in the event of the transfer by the original tenant. It follows accordingly that this covenant was operative not merely between the second defendant and the plaintiff but also between the first defendant and the plaintiff when the former purchased the tenancy at a sale in execution of a rent decree; and if the covenant was operative as against the land in the hands of the first defendant, it would be equally operative when he attempted to transfer the land to the second defendant. The question thus arises, whether in these circumstances the first defendant is liable to pay rent under the terms of the lease. The decision of this Court in *Rup Chand Ghose v. Narendra Krishna Ghose* (4) shows that the answer must be in the affirmative. We must hold accordingly that the first defendant did not divest himself of his liability to pay rent by the execution of the conveyance in favour of the second defendant. We need not consider whether the conveyance has created a valid title in the second defendant as against the plaintiff. It is sufficient for us to hold for the purposes of this appeal, that the first defendant has not divested himself of the liability to pay rent. Nor do we set aside the decree for rent made by the lower appellate Court against the second defendant, inasmuch as the second defendant has not preferred an appeal.

The result is that this appeal is allowed and the decree of the Subordinate Judge modified. There will be a decree for rent against both the defendants. We direct however, that the plaintiff do execute this decree in the first instance against the tenure itself. If by the sale of the tenure, the judgment debt is not satisfied, the plaintiff will be entitled to proceed against either of the defendants at his choice. As the ground on which this appeal has succeeded was not taken in either of the Courts below, each party will pay his own costs throughout the litigation.

A. T. M.

Appeal allowed: Decree modified.

(1) (1868) L. R. 3 Q. B. 739.

(2) (1902) A. C. 204.

(3) (1869) L. R. 4 Q. B. 634.

(4) (1914) 19 C. W. N. 112.

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Before Sir Asutosh Mookerjee, Knight Judge, and Mr. Justice Chotzner.

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July, 10, 11.

BAIDYA NATH CHATTERJEE

v.

PANCHANANI DASİ AND OTHERS.*

Award, effect of.

A valid award is operative from the date of its passing and binds the parties even though neither party has sought to enforce it by a regular suit or by the summary procedure.

As between the parties and their privies, an award is entitled to that respect which is due to the judgment of a Court of last resort.

A and B made a reference to arbitration in respect of property X on the 9th September, 1916. On the 24th September, 1916, the arbitrator made his award whereby X was declared to be the property of A alone. On the 29th September, 1916, B conveyed X to C:

Held, that C acquired no title to the property X.

Appeal by Defendant No. 1.

Suit for recovery of possession of land on establishment of title by purchase. The material facts appear from the judgment.

Dr. Jadu Nath Kanjilal for the Appellant.

Babus Satindra Nath Mukherjee and *Narendra Kumar Das* for the Respondents.

C. A. V.

The judgment of the Court was delivered by

July, 11.

Mookerjee J:—This is an appeal by the first defendant in a suit for recovery of possession of land on establishment of title by purchase. The case for the plaintiff is that the property belonged to the second defendant who conveyed it to her on the 29th September 1916 pursuant to an agreement made eight days earlier. The case for the first defendant is that the claim is unfounded inasmuch as he had become entitled to the property by virtue of an award made on the 24th September 1916 in an arbitration proceeding between himself and his brother the second defendant. The Court of first instance held that the plaintiff had acquired no valid title by her purchase from the second defendant and dismissed the suit as

* Appeal from Appellate Decree No. 2290 of 1920, against the decree of Babu Lal Behari Chatterjee, Subordinate Judge of Hughly, dated the 16th July, 1920, modifying that of Moulvi Lutfar Rahman, Munsif of Serampur, dated the 18th July, 1919.

against the first defendant. The Court however made a decree for Rs. 175 against the second defendant who it was found had obtained that sum from the plaintiff as consideration for the conveyance. Upon appeal, the subordinate Judge has held that the title to the property was vested in the first two defendants, and thus the plaintiff had consequently acquired a good title to one-half share of the property. On this basis, a decree has been made in favour of the plaintiffs for one-half share of the property and also for mesne profits.

On the present appeal, the first defendant has contended that the conveyance executed by the second defendant in favour of the plaintiff could not transfer a good title to the property inasmuch as the vendor had no title thereto. We are of opinion that this contention is well-founded. It appears that on the 9th September 1916 the first two defendants made a reference to arbitration in respect of this property. On the 24th September 1916 the arbitrator made his award whereby this property was declared to be the property of the first defendant alone. On the 29th September 1916, that is after the award had been made, the second defendant conveyed the property to the plaintiff on the basis of the alleged agreement made eight days earlier. The first defendant thereafter applied to the Court to make a decree in accordance with the award. That proceeding was instituted only against the second defendant who was a party to the arbitration proceedings. The consequence was that a decree was made on the 16th December, 1916. On these facts, it has been urged that as this decree was made long after the conveyance, the title of the plaintiff was not affected thereby. In our opinion this view is manifestly erroneous.

The effect of the award of the arbitrator was to vest the title to the property in the first defendant. From that date, the second defendant could not set up a claim to that property. The consequence was that on the date when the second defendant purported to transfer his interest in the property to the plaintiff he had no interest to convey. The effect of an award was considered by the Judicial committee in the case of *Muhammad Nawazkhan v. Alam Khan* (1). In that case A. & B. had referred certain matter in difference between them to X. X, made his award in favour of A. A made an application under section 525 of the Code of 1882 to file the award and it was dismissed. B then brought a suit to recover the property which had formed the subject matter of arbitration. A set up the award in answer to the claim. The Judicial Com-

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mittee held that the award was valid and was binding upon B, and that although the application under section 525 was refused that merely left the award to have its ordinary legal validity. It could not be successfully contended that an award was not valid because the party in whose favour it was had never applied to have it filed in Court. The refusal to file an award or of an application made to do so would not have the effect that the award could never be relied upon in any suit relating to the subject matter dealt with by it. The Judicial Committee then examined the grounds upon which the validity of the award was sought to be impeached and found them to be unsustainable, with the consequence that the plaintiff who had asked for recovery of the property in contravention of the title created by the award, failed. It was pointed out by this Court in the case of *Bhajahari Saha Banikya v. Behary Lal Basak* (1), that this decision of the Judicial Committee clearly shows that if an award is valid, it is operative, even though neither party has sought to enforce it by a regular suit or by the summary procedure. This conclusion is based upon the elementary principle that as between the parties and their privies, an award is entitled to that respect, which is due to the judgment of a Court of last resort. The award is in fact a final adjudication by a Court of the parties' own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award which is on the face of it regular is binding. The position consequently is that on the 24th September 1916 the title of the second defendant, if any to the property in suit was extinguished and under the award the property vested finally in the first defendant. The result follows that the plaintiff did not acquire any title to the property by her conveyance taken from the second defendant. In the present suit, no grounds have been made out to establish the invalidity of the award. We hold accordingly that the plaintiff has failed to make out her alleged title to the property.

The result is that this appeal is allowed, the decree of the Court of appeal below set aside and that of the Court of first instance restored with costs both here and in the lower appellate Court.

A. T. M.

Appeal allowed.

(1) (1906) I. L. R. 33 Calc. 381; 4 C. L. J. 162.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cholsner.

KULADA PRASAD CHATTERJEE AND OTHERS

v.

KHUDIRAM MISRA AND ANOTHER.*

Mesne profits—Claims, splitting of—Civil Procedure Code (Act V of 1908) O. 2 R. 2.

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Every suit shall include the whole of the claim arising from one and the same cause of action and not every claim or every cause of action which the plaintiff may have against the defendant: *Pittapur Raj v. Suriya Rau* (1). The test is, whether the cause of action in the subsequent suit is different from the cause of action in the earlier suit? If the answer be in the affirmative, the subsequent suit is not barred, even though it might have been open to the plaintiff to unite the cause of action with the cause of action in the prior suit: *Mullick v. Sheopershad* (2).

The plaintiffs instituted a suit in 1913 against the defendants for recovery of possession of the disputed land with mesne profits upon establishment of title. That suit was decreed on the 22nd May, 1914. The plaintiffs became entitled to recover possession of the land and also to realise the mesne profits which had accrued due antecedent to the suit. In July 1914, the plaintiffs executed the decree and obtained symbolical possession through Court. On the 12th February, 1917, the plaintiffs instituted a suit against the defendants for recovery of mesne profits subsequent to the institution of the suit and up to the date of delivery of possession. This suit was decreed. On the 20th April, 1918, the plaintiffs commenced this litigation against the defendants for recovery of mesne profits from the date of delivery of symbolical possession up to 13th April 1918:

Held, that Order 2 rule 2 of the Code of Civil Procedure did not operate as a bar in respect to the portion of the claim for mesne profits which had accrued due subsequent to the delivery of symbolical possession and before the institution of the first suit for mesne profits.

The delivery of symbolical possession was the time of demarcation between possession antecedent and possession subsequent: *Thakur Sri Sri Radha Krishna v. Ram Bahadur* (3).

Though the judgment-debtors were actually in possession and the decree-holders were consequently entitled to take not merely formal possession but actual possession, yet the formal possession given to the decree-holders was in the eye of law sufficient possession as against the judgment-debtors: *Hari Mohan v. Babur Ali* (4). Hence the claim for mesne profits subsequent to the delivery of possession was not based on an identical cause of action: *Muhammad Haffs v. Muhammad Zakariya* (5) distinguished.

Appeal by the Defendants.

* Appeal from Appellate Decree No. 1378 of 1920, against the decree of Babu Aswini Kumar Das Gupta, Subordinate Judge of Asansol, dated the 28th February, 1920, modifying that of Babu Nalini Kanta Basu, Munsiff of Asansol, dated the 19th March, 1919.

(1) (1885) L. R. 12 I. A. 116; I. L. R. 8 Mad. 520.

(2) (1896) I. L. R. 23 Calc. 821.

(3) (1917) 22 C. W. N. 330.

(4) (1897) I. L. R. 24 Calc. 715.

(5) (1921) L. R. 49 I. A. 9; 35 C. L. J. 126.

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Suit for recovery of mesne profits.

Babus Sarat Chandra Roy Chowdhury and Gopendra Nath Das
for the Appellants.

Babu Pyari Mohan Chatterjee (for *Babu Bankim Chandra Mookerji*) for the Respondents.

The judgment of the Court was delivered by

Mookerjee J: This is an appeal by the defendants in a suit for recovery of mesne profits. The only question in controversy is, whether the suit is barred under the provisions of Order 2 rule 2 of the Civil Procedure Code of 1908. The facts material for the determination of this question may be briefly recited. The plaintiffs instituted a suit in 1913 against the defendants for recovery of possession of the disputed land with mesne profits upon establishment of title. That suit was decreed on the 22nd May 1914. The plaintiffs became entitled to recover possession of the land and also to realise the mesne profits which had accrued due antecedent to the suit. In July 1914 the plaintiffs executed the decree and obtained symbolical possession through Court. On the 12th February 1917, the plaintiffs instituted a suit against the defendants for recovery of mesne profits subsequent to the institution of the suit and up to the date of delivery of possession. This suit was decreed. On the 20th April 1918 the plaintiffs commenced this litigation against the defendants for recovery of mesne profits from the date of delivery of symbolical possession up to the 13th April 1918. In these circumstances the question arises whether the provisions of order 2 rule 2 operate as a bar in respect of that portion of the claim for mesne profits which had accrued due subsequent to the delivery of symbolical possession and before the institution of the first suit for mesne profits. The Courts below have answered the question in favour of the plaintiffs. On behalf of the defendants it has been maintained in this Court that the mesne profits claimed in this suit for the period subsequent to the delivery of symbolical possession and prior to the date of the institution of the first suit for mesne profits could and should have been claimed in that suit. To test the validity of this contention we have to determine whether this portion of the claim is based on the cause of action which was the foundation of the claim for mesne profits for the period antecedent to the delivery of symbolical possession. On behalf of the plaintiffs respondents, it has been maintained that delivery of possession operated to interrupt the prior adverse possession and that the continuance in occupation by the defendants gave rise to a new cause of action; in other words, that the delivery of symbolical possession is

the line of demarcation between possession antecedent and possession subsequent. This contention is supported by the decision of the Judicial Committee in the case of *Thakur Sri Sri Radhakrishna Chanderji v. Ram Bahadur* (1). In that case, Lord Sumner pointed out that when a decree-holder has received formal possession as usual after due proclamation by beat of drum, adverse possession of the judgment-debtor is interrupted. In support of this view reference was made to the decision of a Full Bench of this Court in the case of *Juggobundhu Mukerjee v. Ram Chunder Bysack* (2) which was treated as an authority for the proposition that symbolical possession availed to dispossess the judgment-debtors sufficiently, because they were parties to the proceeding in which delivery was ordered and given. Lord Sumner added that this decision was one of long-standing and had been followed for many years and he saw no reason to question or to hold that this rule of procedure should now be altered. In the case before us, no doubt, the decree-holders were entitled to actual possession. But this circumstance does not make any difference in the position of the parties as is clear from the decision in *Hari Mohan Shaha v. Baburahi* (3) where it was pointed out, on the authority of the earlier decisions in *Lokessur v. Purgun Roy* (4) and *Shama Charan v. Madhub Chandra* (5), that though the Judgment-debtor was actually in possession and the decree-holder was consequently entitled to take not merely formal possession but actual possession yet the formal possession given to the decree-holders was in the eye of law sufficient possession as against the judgment debtor. This view was also adopted in the case of *Wasiruddin v. Deoki Nandan* (6). We must consequently hold that the claim for mesne profits subsequent to the delivery of possession cannot be deemed to be based on an identical cause of action. This serves to distinguish the decision of the Judicial Committee in the case of *Muhammad Hafiz v. Muhammad Zakariya* (7). In that case, a suit was instituted for recovery of interest due on a mortgage. A subsequent suit was instituted for recovery of the principal and interest. It was ruled that the claim for principal was barred under order 2 rule 2 as the claim had accrued due before the institution of the prior suit and as the claim for principal and interest arose out of the same cause of action they should have been united in the previous suit. We may

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(1) (1917) 22 C. W. N. 330.

(2) (1880) I. L. R. 5 Calc. 584.

(3) (1897) I. L. R. 24 Calc. 715.

(4) (1881) I. L. R. 7 Calc. 418.

(5) (1884) I. L. R. 11 Calc. 93.

(6) (1907) 6 C. L. J. 472.

(7) (1921) L. R. 49 I. A. 9 ; 35 C. L. J. 126.

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point out that the rule is that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant. This is supported by the decisions of the Judicial committee in *Pittapur Raja v. Suriya Rau* (1) and *Chand Koer v. Partab Singh* (2). The test is whether the cause of action in the subsequent suit is different from the cause of action in the earlier suit? If the answer be in the affirmative, the subsequent suit is not barred, even though it might have been open to the plaintiff to unite the cause of action with the cause of action in the prior suit, *Mullick v. Sheo Pershad* (3). We hold accordingly that the courts below have correctly adopted the view that this suit is not barred under order 2 rule 2 Civil Procedure Code. It has not been argued before us that the proper remedy of the plaintiffs is not by a suit for mesne profits but by a suit for recovery of possession. We need not consequently express an opinion upon that question.

The result is that this appeal is dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1883) L. R. 12 I. A. 116; I. L. R. 8 Mad. 320.

(2) (1888) L. R. 15 I. A. 156; I. L. R. 16 Calc. 98.

(3) (1896) I. L. R. 23 Calc. 821.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Chotsner.

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June, 8, 9.

PURNA CHANDRA DAS AND ANOTHER

v.

ALI MAHAMMAD.*

Ejectment—Raiyat, status of—Lease, condition in, entitling landlord to realise rent by summary process—Bengal Tenancy Act (VIII of 1885), Sec. 49 (b)—Notice, form of—Waiver—Receipt of rent due prior to forfeiture.

The status of a raiyat is not elevated by a condition in a lease entitling the landlord to realise rent by summary process.

* Appeal from Appellate Decree No. 1545 of 1920, against the decree of R. P. Maitra Esq., Subordinate Judge of Chittagong, dated the 10th March, 1920, reversing that of Babu Pran Kumar Basu, Munsiff of Satkania, dated the 10th December, 1918.

The technicalities of the English law relating to the form and contents of a notice to quit should not be introduced in connection with the provisions of section 49 of the Bengal Tenancy Act: *Harifullah v. Benode* (1).

There is sufficient compliance with the requirements of section 49 of the Bengal Tenancy Act, if what is served upon the tenant gives him notice to quit the land at the end of the agricultural year next following and the suit is instituted after the lapse thereof: *Naharulla v. Madan* (2) and other cases.

Where the notice to an under-raiyat was described as a notice under section 49 of the Bengal Tenancy Act and there was no specification of the date when the tenant was required to vacate the land, but the suit was instituted long after the expiry of the agricultural year following that in which the notice was served:

Held, that the requirements of section 49 (b) of the Bengal Tenancy Act were fulfilled.

Receipt of rent due prior to forfeiture, subsequent to the service of notice to quit under section 49 (b) of the Bengal Tenancy Act, is not a waiver of the right of the landlord to eject: *Peer Bux v. Mowkah* (3).

Appeal by the plaintiffs.

Suit for ejectment.

The material facts appear from the judgment.

Babu Narendra Kumar Das for the Appellants.

Babu Chandra Sekhar Sen for the Respondent.

C. A. V.

The judgment of the Court was delivered by

Mookerjee J: This is an appeal by the plaintiffs in an action in ejectment. The case for the plaintiffs is that they are raiyats, that the defendants are the representatives in interest of an under-raiyat and that they have unlawfully continued in occupation of the land notwithstanding the service of notice to quit in accordance with clause (b) of section 49 Bengal Tenancy Act. They accordingly instituted this suit on the 7th January 1918 to eject the defendant. The Court of first instance decreed the suit. Upon appeal that decision has been reversed by the Subordinate Judge. On the present appeal three questions have been raised viz, first, what was the status of the plaintiffs? Were they raiyats as alleged by them or tenure-holders as alleged by the defendant? secondly, if the defendants were under-raiyats under the plaintiffs, has their tenancy been terminated by a notice to quit; and thirdly, have the plaintiffs by acceptance of rent from the defendants subsequent to the service of notice to quit, waived their right to eject them.

(1) (1913) 17 C. W. N. 932.

(2) (1896) 1 C. W. N. 133.

(3) (1862) Marshall 25.

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As regards the first question, the status of the plaintiffs must be determined with reference to the lease obtained by them from the talukdars on the 10th May 1860. On a true construction of this document, there is no room for controversy that the plaintiffs acquired the interest of a raiyat. But it has been argued that inasmuch as the plaintiffs and their landlords covenanted that on failure to pay rent under the lease the landlord would be entitled to receive rent by the summary process prescribed in the Putni Regulation of 1819, the status of the plaintiffs must be deemed to have been that of a tenure-holder, if not that of a putni talukdar. We are of opinion that there is no force in this contention. The tenancy of the plaintiffs was unquestionably a raiyat's tenancy. The status of the plaintiffs could not be elevated because a condition was annexed to the lease which entitled the landlord to realise rent by summary process. It is not necessary for our present purpose to determine whether such a condition is valid. It is sufficient to hold that this covenant does not alter the nature of the tenancy. We hold accordingly that the plaintiffs were raiyats and the defendants were under-raiyats.

As regards the second point, we have to consider whether the tenancy has been terminated by a valid notice to quit. It is not disputed that on the 26th December, 1914 a notice was served by the plaintiffs upon the defendant. This notice was described as a notice under section 49 Bengal Tenancy Act. It stated in the first place that the plaintiffs did not admit that the defendants were under-raiyats. But it was added that if they were under-raiyats, they should vacate the land. There was no specification of the date when the defendants were required to vacate the land. But the suit was not instituted till the 7th January, 1918. The question arises whether this is a valid notice to quit within the meaning of clause (b) of section 49 Bengal Tenancy Act which provides that an under-raiyat should not be liable to be ejected by his landlord except when holding otherwise than under a written lease, at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord. In the present case, the predecessor in interest of the defendants entered upon the land on the basis of a kabulyat executed by him on the 12th May 1898 for a term of one year. After the expiration of the term, the tenant held over, and after his death, his representatives in interest have continued in occupation of the land on payment of rent to the landlords. The defendants must be deemed to have been under-raiyats who held otherwise than under a written lease.

They were consequently entitled to a notice to quit. But the section does not specify the form or the contents thereof. It was pointed out by Sir Lawrence Jenkins C. J. in the case of *Harifullah Gazi v. Benodebehary Mandal* (1), that the technicalities of the English Law relating to the form and contents of a notice to quit should not be introduced in connection with the provisions of section 49, Bengal Tenancy Act. There is sufficient compliance with the requirements of section 49 if what is served upon the tenant gives him notice to quit the land at the end of the agricultural year next following and the suit is instituted after the lapse thereof. This view is in accordance with that adopted in the cases of *Nahurulla Patwari v. Madan Gazi* (2); *Dwarkanath v. Rani Dassi* (3) and has been subsequently followed in the case of *Chandi Charan v. Samla Bibi* (4). In the case before us, the notice is described as a notice under section 49 Bengal Tenancy Act and the suit has been instituted long after the expiry of the agricultural year following that in which the notice was served. We hold accordingly that the requirements of section 49, have been fulfilled.

As regards the third point, our attention has been drawn to the fact that after the service of notice on the defendants, the plaintiffs received from them rent for the year 1915—1916. It has been argued before us that receipt of rent subsequent to the service of notice to quit operated as waiver. We are of opinion that this contention is fallacious. Subsequent receipt of rent due prior to forfeiture is not waiver. This was laid down by Sir Barnes Peacock C. J. in the case of *Peer Bux v. Mowzah Ally* (5) where he observed that receipt of rent for any year is confirmation of tenancy for that year and conclusively binds the landlord from contending that the defendant was a trespasser in that or any previous year. It does not, however, debar the landlord from maintaining that the defendant was not a tenant in respect of the period subsequent to that for which rent had been received. This rule has been followed in this Court in the cases of *Jogeshuri v. Mahomed* (6); *Sita Nath v. Basudeb* (7), and *Kalanand v. Gunput* (8). The rule was applied by the Madras High Court in the cases of *Marbonu v. Parembli* (9), and *Padmanabhaya v. Ranga* (10). The principle was affirmed recently by the Patna High Court in the

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(1) (1913) 17 C. W. N. 932.

(2) (1896) 1 C. W. N. 133.

(3) (1900) 1 L. R. 28. Calc. 308.

(4) (1917) 28 C. L. J. 91.

(5) (1862) Marshall 25.

(6) (1886) 1 L. R. 14 Calc. 33.

(7) (1900) 2 C. L. J. 540.

(8) (1911) 16 C. W. N. 104.

(9) 8 M. L. T. 99.

(10) (1910) 1 L. R. 34 Mad. 161.

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case of *Shah Wali Ahmad v. Hussain Begam* (1). This is in accordance with the rule well-recognised in England where in the case of *Price v. Worwood* (2), Pollock, C. B. stated that receipt of rent is not waiver of forfeiture, unless it be of rent due after the forfeiture was incurred. Entry for condition broken does not at all affect the right to receive payment of a pre-existing debt. The same view had been taken earlier in the case of *Dendy v. Nicholl* (3) and was subsequently approved in the case of *Penton v. Barnett* (4). The defendants in the case before us were not liable to be ejected till the commencement of the year 1916-17 consequently the acceptance of rent from them for the preceding year during which they continued to be tenants was in no sense a waiver of the right of the plaintiffs to eject them.

The result is that this appeal is allowed, the decree made by the Subordinate Judge set aside and that of the Court of first instance restored with costs in all the Court.

A. T. M.

Appeal allowed.

(1) (1917) 2 P. L. J. 595.

(2) (1859) 44 H. & N. 512; 118 R. R. 584.

(3) (1858) 4 C. B. N. S. 376; 114 R. R. 773.

(4) (1897) [1898] 1 Q. B. 276.

Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice Chotzner.

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July, 12, 13.

ANNADA CHARAN SIL AND ANOTHER

v.

HARAGOBINDA SIL AND OTHERS.*

Mortgage—Evidence to vary amount of consideration, if admissible—Case, determination of—Fraud.

While want or failure or difference in kind of the consideration may be proved, evidence to vary the amount of consideration in a deed is inadmissible: *Adityam v. Rama Krishna* (1).

*Appeal from Appellate Decree No. 2430 of 1920, against the decree of W. A. Seaton Esq, District Judge of Chittagong, dated the 8th September, 1920 reversing that of Babu Narayan Chandra Ghosh, Munsif of Chittagong dated the 29th November, 1919.

(1) (1913) I. L. R. 38 Mad. 514.

The determination in a case should be founded upon a case either to be found in the pleadings or involved in and consistent with the case thereby made. This rule should not be applied in an abstract way regardless of the circumstances of the case.

A party cannot come into Court with fraud on his lips and ask for a relief, as to such the Courts of justice are not open.

Appeal by the Defendants.

Suit to enforce a mortgage.

The material facts appear from the judgment.

Babus Dwarka Nath Chuckerbutty, Chandra Sekhar Sen and Promatha Nath Bandopadhyaya for the Appellants.

Babus Sarat Chandra Roy Chowdhury and Nripendra Chandra Das for the Respondents.

C. A. Y.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the defendants in a suit to enforce a mortgage executed by them on the 22nd December 1916 in favour of the plaintiffs to secure a loan of Rs. 800. The plaintiffs alleged that nothing had been paid on the mortgage and according to the terms thereof they claimed Rs. 1071. The defendants pleaded that the debt had been satisfied and the claim was unfounded. The Court of first instance dismissed the suit. Upon appeal the District Judge reversed that decision and decreed the claim in full with interest from the date of suit to the date of judgment. In their plaint the plaintiffs allege that the mortgage bond was part of a transaction which took place between the parties on the 22nd December 1916. The plaintiffs and the defendants were partners in a paddy business at Akyab. The defendants, it is alleged, fixed the price of the share of the plaintiff in the business at Rs. 3,000 and purchased that share for the sum. The defendants paid Rs. 1,500 in cash, Rs. 400 by a boat and for the balance of Rs. 1,100 executed two bonds for Rs. 300 and Rs. 800 respectively. According to the plaintiffs, the bond for Rs. 300 has been satisfied; but nothing has been paid on the bond for Rs. 800. The defendants alleged that the sale had been effected not for Rs. 3,000 but for Rs. 2,000, that Rs. 500 had been paid in cash and that for the balance two bonds had been executed for Rs. 300 and Rs. 800 respectively. They further pleaded that both the bonds had been satisfied. The conveyance, when produced, showed that the consideration for the sale was Rs. 2,000 as alleged by the defendants and not Rs. 3,000 as alleged by the plaintiffs. This placed the

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plaintiffs in a situation of considerable embarrassment and they asked for leave to amend the plaint. This application was refused. There was consequently an obvious variance between the pleadings and the proof. If in these circumstances, the plaintiffs proceeded with their case on the basis mentioned in the plaint, they would contravene a well-known rule of law repeatedly affirmed by the Judicial Committee, by Lord Westbury in *Eshen Chunder Singh v. Shama Churn Bhutto* (1), by Sir Barnes Peacock in *Mylapore v. Yeo Kay* (2), and by Sir Lawrence Jenkins in *Malaju Lakshmi v. Venkatadri Appa* (3). This principle is well established namely, that the determinations in a case should be founded upon a case either to be found in the pleadings or involved in and consistent with the case thereby made; and it has been applied recently in this Court in the case of *Nabadipendra Mukerjee v. Madhusudan Mondal* (4), *W. J. Rees v. John Young* (5), *Gopal-krishna Sil v. Abdul Samad* (6), and *Satish Chundra Ghose v. Kali dasi Dasi* (7). No doubt, as explained by Viscount Haldane in *Haji Umar v. Gustadji* (8), and by Lord Dunedin in *Motabhoj v. Mulji* (9) the rule should not be applied in an abstract way regardless of the circumstances of the case. But, when the plaintiffs had failed to obtain an amendment of the plaint so as to bring their case into harmony with the statement in the conveyance the only course open to them was to make an attempt to adduce evidence in contradiction to the statement in the conveyance, namely, to show by oral evidence that although the conveyance recited the consideration as Rs. 2000, the actual consideration was Rs. 3,000. This they did, notwithstanding the protest of the defendants. Consequently two questions arise, namely, first, whether it was permissible to the plaintiffs in view of the provisions of section 92 of the Evidence Act to contradict the terms of the conveyance; and secondly, whether it was competent to them to prove that they had committed a fraud upon the revenues of the country.

As regards the first point, it has been pointed out by the Madras High Court in *Adityam Iyer v. Rama Krishna Iyer* (10), that while

(1) (1866) 11 M. L.A. 7.

(2) (1887) L. R. 14 I. A. 168; I. L. R. 14 Calc. 801.

(3) (1920) 33 C. L. J. 171; 25 C. W. N. 654.

(4) (1912) 18 C. W. N. 473.

(5) (1921) 34 C. L. J. 178.

(6) (1921) 34 C. L. J. 319.

(7) (1921) 34 C. L. J. 529.

(8) (1915) 20 C. W. N. 297.

(9) (1915) L. R. 47 I. A. 103.

(10) (1913) I. L. R. 38 Mad. 514.

want or failure or difference in kind of the consideration may be proved, evidence to vary the amount of consideration in a registered sale-deed is inadmissible. This position is not inconsistent with the decisions of the Judicial Committee in *Achal Ram v. Kazim Husain Khan* (1), and *Hanifun-nissa v. Faizunnissa* (2), which affirmed the proposition that it is open to the parties to prove by oral evidence that the actual consideration was different from what was mentioned in the deed or that there was no consideration for the deed. This view was approved by this Court in the case of *Gopal Singh v. Laloo Lall* (3). There can be little doubt that the view taken by the Madras High Court in *Adityam Iyer v. Rama Krishna* (4), is well-founded on principle. To take an illustration, suppose a mortgage bond had been executed for Rs. 1000. Would it be competent to the mortgagee who instituted a suit to enforce the security for Rs. 1000 to prove by oral evidence that the real consideration was not Rs. 1000 as stated in the bond but Rs. 5000. If such a course were permissible, the protection intended by the Legislature to be afforded by the adoption of the rule embodied in section 92 of the Evidence Act would be completely nullified.

As regard the second point there can be no doubt that if the plaintiffs are permitted to prove their allegation that the conveyance was not for Rs. 2000 but for Rs. 3,000 they will have to establish that they have committed a fraud upon the revenues of the country. If the conveyance had been for Rs. 3,000, the stamp duty payable would have been Rs. 30. Their allegation is that although the consideration was Rs. 3,000 it was deliberately stated to be Rs. 2,000 because they were unable to procure a stamp paper of the proper value. This story has been disbelieved by both the Courts below. In such circumstances, if they are now permitted to contradict the statement in the conveyances they would only be permitted to allege that they have violated the law. Under these circumstances the principle applies, that a party cannot come into the Court with fraud on his lips and ask for a relief; as to such the Courts of justice are not open; see the observations of Sanderson C. J. in *Gregory v. Hawthth* (5) where a similar attempt was made. In the same case, it was pointed out that the parties should not be permitted to depart from the deeds and to establish a case which is contrary to

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(1) (1904-5) L. R. 32 I. A. 113; I. L. R. 27 All. 271; 9 C. W. N. 477.

(2) (1911) I. L. R. 33 All. 340.

(3) (1909) 10 C. L. J. 27.

(4) (1913) I. L. R. 38 Mad. 514.

(5) 25 California 622 (657).

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their pleadings. This cannot be allowed without a gross violation of the rule which requires that the allegations of the complaint, the evidence and the findings should correspond in legal intent. The averment, the proof and the finding should harmonise and proceed upon the same theory, each pointing with logical distinctness to the same result. A recovery, if had, must be *secundum allegata* and must be grounded upon facts which are averred in the complaint and not upon those which are denied.

We are consequently of opinion that the case has not been approached from the right point of view by the District Judge. The rights of the parties must be determined on the assumption that the statements in the conveyance are true. The result is that this appeal is allowed, the decree of the District Judge set aside and the case remitted to him for reconsideration. The cost of this appeal will abide the result.

A. T. M.

Appeal allowed: case remanded.

Before Sir Thomas William Richardson, Knight, Judge and Mr. Justice Suhrawardy.

RAJA BHUPENDRA NARAYAN SINGHA BAHADUR

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* *Rajaswa*, meaning of—Demand from the Zemindar, not necessarily a demand on the Zemindari—Rent, if includes cess.

Per Curiam: The word '*Rajaswa*' in a putni lease is wide enough in its natural meaning to include cess payable under the Cess Act of 1871 and 1880.

Per Richardson J: A demand from the Zemindar is not necessarily the same thing as a demand on the Zemindari. But a demand, from the Zemindar of an impost payable by him in respect of the lands comprised in his estate is a demand on the Zemindari.

Rent as defined in the Bengal Tenancy Act includes cess.

Per Suhrawardy J: Where there is no ambiguity in the meaning of a word or sentence in a document it is not within the province of the Court to look to the

* Appeal from Appellate Decree No. 947 of 1920 against the decree of B. N. Rau Esq., District Judge of Murshidabad dated the 28th of January 1920 affirming that of Babu Harijiban Banerjee, Munsif, 2nd Court at Berhampore dated the 23rd of June 1919.

conduct of the parties, which might have been due to neglect, oversight or ignorance on their part.

Appeal by the Plaintiff.

Suit for recovery of an amount alleged to be due as the balance of Road and Public Works cesses payable for 1322 to 1325 B. S.

Babus Mahendra Nath Roy and Promotha Nath Bandopadkaya (for *Babu Priya Sankar Majumdar*) for the Appellant.

Mr. U. N. Sen Gupta and Babu Khitish Chandra Chakervarti (for *Babu Probodh Kumar Das*) for the Respondents.

The judgments of the Court were as follows :

Richardson J.:—The Plaintiff in the second appeal is the proprietor of a Zemindary of the entirety of which the defendant company holds a putni lease. The lease is evidenced by a Kabuliyat executed by the predecessor of the company in the year 1858. The terms of the lease were confirmed and ratified by the company by an Ekrarnamah executed on its behalf on the 2nd Falgoon, 1314, (February 1908), by which the company agreed to abide by and conform to the terms and conditions embodied in the Pattah and Kabuliyat of the original putni settlement. The suit was brought for the recovery of an amount alleged to be due as the balance of Road and Public Works cesses payable for the four years 1322 to 1325. Under section 41 of the Cess Act of 1880 the total amount of the cess annually payable by the Zemindar to the Government is Rs. 95/9/6 p while the amount annually payable by the putnidar to the Zamindar is under the same section Rs. 80-6-3 p. The Company has regularly paid the latter amount to the Zamindar and the suit is for the balance still due if the Company ought to have paid the larger sum.

It is conceded that it is open to the parties to a putni lease to contract themselves out of the provisions of section 41 of the Cess Act; in other words the provisions of that section are subject to any special provision contained in the contract between the parties. The point at issue and the arguments advanced on either side are clearly and concisely stated by the learned Judge in the judgment from which this appeal is brought. "The main question in appeal" he says, "is that of the correct interpretation of the terms of the Putni Kabuliat. The kabuliat was executed by a predecessor in interest of the company in favour of the then Zamindar in the year 1858, that is about 13 years before the passing of the Cess Act." The learned Judge was referring to the first Cess Act which was passed

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in 1871. He continues : " The clause relied on by the plaintiff has been translated thus, 'If there be any demand on the Zemindari for any new amount on account of *rajaswa* or if any order is passed, then I shall, without any objection, abide by it and pay my rent along with it (the new amount that is)'. " It is conceded before us that this is a substantially correct translation of the clause in the Kabuliya, which is in Bengali. The learned Judge goes on—"The plaintiffs' contention is that the annual demand of Rs. 95-9-6 p. imposed under the Cess Act on the Zemindar was a demand for a new amount on account of *rajaswa* within the meaning of the above clause, and as such payable in its entirety by the putnidar. On behalf of the defendant Company it is contended that a demand from the Zemindar is not the same thing as "a demand on the Zemindari", that the latter term includes all demands on the various subordinate interests comprised in the Zemindari and that in its application to the parties in the present suit it must be confined to the demand that may lawfully be made by the Zemindar from the putnidar. It is also contended that the term *rajaswa* does not cover a demand under the Cess Act."

The learned Judge does not himself express any opinion as to the meaning of the term '*rajaswa*'. He agrees, however, with the trial Court in the view that the clause as a whole is ambiguous. Approaching the case in that way the learned Judge like the learned Munsiff has attached great importance to the fact that for over 40 years the plaintiff and his predecessor were content to accept from the Company and their predecessor the smaller amount due under the provisions of section 41 of the Act. I quite agree that if there is any real ambiguity in the clause as it stands in the Kabuliya, it is open to the Courts to have regard to the conduct of the parties and to the construction of the clause upon which they acted during this long course of years. Such construction hardly amounts to contemporanea expositio because it does not go back to the creation of the Putni, but relates to a state of things which came into existence some years later at a time when the terms of the original agreement might have been forgotten or overlooked. Nevertheless if the meaning had been doubtful, assistance might have been sought from the conduct of the parties. But apart from any question of ambiguity, the mere fact that the parties have acted on an erroneous construction of an instrument furnishes in itself no reason why the Courts should not follow the general rule, that an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed. It is not

suggested that the Company has acquired a right by limitation, or by anything in the nature of binding agreement to pay cess at the lower figure.

The question then is whether there is any real ambiguity in this clause and it turns in the main on the import of the word '*rajaswa*.' The Munsiff says, "Taking it literally it has the wide sense of anything payable to the King, although it is commonly used in the sense of rent or revenue payable". In my opinion, and I understand my learned brother is of the same opinion—the word *rajaswa* as used in this document is wide enough to include any imposition or levy payable to state and is therefore wide enough in its natural meaning in the context in which it is found to include cess payable under the Cess Acts of 1871 and 1886. It must be borne in mind that the putni tenure held by the Company extends to the whole of the estate in respect of which revenue and cesses are payable by the Zemindar to the Collector on behalf of the Government. It may well have been the intention of the parties that the putnidar should relieve the Zamindar of all additional burden in the nature of a tax imposed on the estate as such.

As to the contention that "a demand from the Zamindar" is not necessarily the same thing as "a demand on the Zamindari" within the meaning of the clause in dispute, that is no doubt true, but not in a relevant sense. Income tax, for instance, might be a demand from the Zamindar, but not a demand on the Zamindari. On the other hand, a demand from the Zamindar of an impost payable by him as the superior landlord in respect of the lands comprised in his estate is, as it seems to me a demand on the Zamindari.

It follows, that, in my opinion, the Company as putnidar is liable to pay the Zamindar the whole amount payable by the latter to the Collector. That seems to me to be the meaning of the clause and I can see no reason why we should not give effect to that meaning.

I should add that the preliminary objection suggested rather than argued that no second appeal lay in this case under the provisions of section 153 of the Bengal Tenancy Act is concluded by the terms of the section and by authority. Rent as defined in the Bengal Tenancy Act includes cess and the dispute between the parties to this suit is therefore a dispute as to the amount of rent annually payable.

The result is that, in my opinion, this appeal succeeds. The

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judgment and decree of the Court below should be set aside and the suit should be decreed with costs throughout.

Suhrawardy J.—I agree in the order my learned brother proposes to pass in this case. In the beginning I felt some difficulty in view of the conduct of the parties, namely, that no demand was made for this excess amount of cess for over 40 years since the first Cess Act was passed from the putnidars. That created a suspicion in my mind that the parties did not intend that any imposition like the Road Cess was included in the contract. On, however, carefully reading that part of the putni Kabuliyat of 1858 which deals with this matter, I think, what the parties intended there was that the putnidar would pay to the Zamindar whatever taxation was imposed on the Zamindari by the sovereign authority. The sentence which translated stands, thus, "If there be any demand on the Zamindari for any new amount on account of *rajaswa* or if any order is passed, then I shall abide by it and pay rent along with it" is an integral part of the Kabuliyat and one of the important terms of the contract. The whole question turns upon what meaning ought to be attached to the word *rajaswa* as used in that sentence.

It is argued that at the time when the parties entered into this contract, it could not be, in their contemplation that the cess in future should be imposed by Government, and therefore, that word ought to be strictly construed as meaning revenue payable on account of the Zamindari to the Government and it would not include any other imposition. That is an argument which cuts both ways. If it was not in the contemplation of the parties that any imposition of cess would be made in future, then it may well be argued that the landlord wanted to provide for any future imposition in whatever name it might be, by the Government on the Zamindari, and the word *rajaswa* was used not in the limited sense of revenue alone, but in the sense which is natural to it, namely, any amount payable by the Zamindar to the sovereign or Government. This view is strengthened by the other words used in that sentence, namely, "New amount on account of *rajaswa*." If the putnidar agreed to pay any addition only to the revenue that may be imposed in future by the Government, one would have expected the use of the expression 'Any additional amount' instead of 'Any new amount.' I am of opinion that there is no ambiguity about the expression *rajaswa* or about the meaning of the sentence as it stands. That being so, it is not the province of the Court to look to the conduct of the par-

ties, which might have been due to neglect, over-sight or ignorance on their part in order to attribute ambiguity to a document where it does not exist. I think the appeal ought to succeed.

As to the preliminary objection, I think, there is no substance in it in view of the definition of rent in the Bengal Tenancy Act and section 57 of the Cess Act of 1880 and the reported authorities in this Court.

R. M. M.

Appeal allowed.

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PRIVY COUNCIL.

PRESENT : Lord Phillimore, Sir John Edge, Sir Lawrence Jenkins
and Lord Salvesen.

MAHOMED SOLAIMAN

v.

KUMAR BIRENDRA CHANDRA SINGH AND OTHERS.

[CONSOLIDATED APPEALS FROM THE HIGH COURT OF JUDICATURE
AT FORT WILLIAM IN BENGAL.]

Revenue Sale Law (Act XI of 1859)—Arrears of revenue—Sale of land—Auction-purchaser—Under-tenants—Ejectment suit—Exceptions to S. 37 of Act XI of 1859 and S. 12 of Bengal Act VII of 1868—Material issues—Findings—Duty of High Court.

A holding in Bengal was sold in auction under Bengal Act XI of 1859 for realisation of arrears of revenue and was purchased by the appellant. The respondents were under-tenants of lands in the holding at the time. In a suit for ejectment and mesne profits by the appellant, the respondents pleaded that there was no arrear of revenue to justify the sale and that they were protected by the exceptions to S. 12 of the Bengal Act VII of 1868.

Held, on the evidence that there was an arrear of revenue to justify the sale : *Haji Buksh Mahi v. Durlav Chandra Kar* (1) distinguished.

Held, also that the respondents were not protected by the exceptions to S. 12 of Bengal Act VII of 1868 nor by the exceptions to S. 37 of Act XI of 1859.

Duty of the High Courts to pronounce their opinion on all important issues in cases before them commented upon : *Tarakant Bannerjee v. Puddomoney Dosses and Others* (2), referred to.

(1) (1912) L. R. 39 I. A. 177 ; I. L. R. 39 Calc. 981 ; 16 C. L. J. 620.

(2) (1866) 10 M. I. A. 476 (488) ; 5 W. R. P. C. 63.

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Mahomed Solaiman

v. Kumar Biresdra.

Consolidated appeals from two decrees of the Calcutta High Court. (Richardson and Greaves JJ.) reversing two decrees of the Subordinate Judge (second Court) of the 24 Parganahs.

The appellant, as the auction-purchaser of a holding in a public auction for arrears of revenue, instituted the suits for ejectment and mesne profits against the respondents who were under-tenants of lands in the holding at the time. The suits were resisted on the ground that there was no arrear of revenue for which the lands could be sold and that they were protected from eviction by the exceptions to section 12 of Bengal Act VII of 1868.

The trial Judge held that there was an arrear of Government revenue, that the sale was good and that the respondents were not within the exceptions of section 12 of Bengal Act VII of 1868; he decreed the appellant's suits. On appeal, the High Court relying upon the decision of the Board in *Haji Buksh Elahi v. Durlab Chandra Kar* (1) disagreed with the trial Judge and came to the conclusion that there was no arrear of revenue. On this finding, the High Court reversed the decrees of the trial Judge and expressed no opinion on the issue whether the respondents came within the exceptions to section 12 of Bengal Act VII of 1868. The present consolidated appeals are against the High Court decrees.

Sir George Lowndes K. C. and *Dube* for Appellant.

De Gruyther K. C. and *Brown* for Respondent Manmatha Nath Mallick.

Wallack for the other Respondents.

The arguments were mainly on the evidence on record.

The judgment of their Lordships was delivered by

Sir John Edge:—These are two consolidated appeals from two decrees, dated the 25th May, 1920, of the High Court at Calcutta, which reversed two decrees, dated the 31st January, 1918 of the Subordinate Judge (Second Court) of the 24 parganahs. The decrees from which these consolidated appeals have been brought were respectively made in suits numbered 19 and 20 of 1917. In each of these suits the present appellant was the plaintiff and some of the present respondents were the defendants in one of the suits and others of the present respondents were the defendants in the other of the suits. The suits were tried together, as were the appeals to the High Court. The suits are suits by an auction purchaser under Act XI of 1859 of lands for ejectment of under-tenants and for mesne profits.

(1) (1912) L. R. 39 I. A. 177; I. L. R. 39 Calc. 984; 16 C. L. J. 620.

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The lands to which the suits relate are situate within the Collectorate of the 24 Parganahs, a permanently settled District of Bengal, to which Act XI of 1859 applies. On the 14th April, 1915 the Collector of the District issued notice and proclamation under Act XI of 1859 that the holding number 20A, which is the land now in question, would be sold under Act XI of 1859 for the realization of Rs. 6, 10 annas and 5 pies revenue in arrears from the year 1320 B. S. The holding was sold by auction on the 17th May, 1915, and was purchased by the plaintiff, who subsequently received a sale certificate. The Government revenue for an arrear of which the holding was sold was the revenue for 1320 B. S. The defendants were at the date of the auction sale under-tenants of lands in the holding sold, and the plaintiff claims to be entitled to eject them.

The plaint and the written statement of Kumar Birendra Chandra Singh, a defendant in suit No. 19 of 1917, and the plaint and written statement in suit No. 20 of 1917, are in the printed record.

In his plaints the plaintiff alleged that the Collector of the District, on the 17th May, 1915, put the holding No. 20A up for sale by auction under the provisions of Act XI of 1859 for arrears of the Government revenue, and that he (the plaintiff), having purchased it at the sale, and having obtained the sale certificate, had, under section 37 of Act XI of 1859, acquired it free of all encumbrances, and had become entitled to annul all the subordinate rights, and to recover ~~his~~ possession of the holding by ejecting the tenants holding any subordinate right and claimed a decree for ejectment and mesne profits. The defence, so far as it is now material, was that there was no arrear of the Government revenue to recover which the Collector was entitled to sell the holding, and that in any case the defendants were within the exceptions of section 12 of Bengal Act VII of 1868; that section 37 of Act XI of 1859 did not apply; and that the plaintiff was not entitled to eject the defendants. The Subordinate Judge fixed five issues, of which issues (2) and (3) are now alone material. Issue (2) was as follows: "Is the sale valid and operative, and has the plaintiff acquired any title under the same by his purchase?" Issue (3) was: "Are the under-tenancies of the defendants protected under section 12 of Act VII of 1868, and whether they can be annulled?" Their Lordships will later have some observation to make as to issue (3).

The Subordinate Judge found that there was an arrear of the Government revenue of Rs. 6, 10 annas 5 pies for 1320 B. S., which entitled the Collector to sell the estate and that the sale was

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good, and that the defendants were not within the exceptions of section 12 of Bengal Act VII of 1868, and he gave to plaintiff a decree for possession and mesne profits in each suit. From these decrees the defendants in each suit appealed to the High Court. In the Memorandum of Appeal to the High Court, in suit No. 19, of 1917, the 3rd ground of appeal was "That the Court below should have held that there were no arrears due for which the sale could be held." The 17th ground of appeal was "That the Court below ought to have held that the tenure of this defendant has been existing from the time of the permanent settlement," and the 20th ground of appeal was "That at any rate the Court below should have held that the tenure of this defendant is protected under the provisions of section 12 of Act VII of 1860 (1868)." In the Memorandum of Appeal in suit No. 20 of 1917, the 4th, 10th and 14th grounds of appeal were the same as the 3rd, 17th and 20th grounds of appeal in suit No. 19 of 1917. The High Court on appeal found that there was no arrear of the Government revenue which entitled the Collector to sell the estate and by its decrees dismissed the suits. From these decrees of the High Court these consolidated appeals have been brought.

The first issue which their Lordships have to consider is—was there an arrear of the Government revenue for 1320 B. S. which entitled the Collector to sell the estate? That is an issue which depends upon the evidence in these suits and not upon the decision of the Board on the facts as found by the Board in *Haji Buksh Elahi v. Durlav Chandra Kar* (1) as the High Court apparently thought it did.

There was no evidence as to when the holding, of which the estate sold by the Collector in 1915, formed part was granted, but there is evidence that one Syed Abdul Ali, who had purchased the holding No. 20-1 in Mouza Paikpara from Srimati Dellorus Banu Begum on the 17th day of Bhadra 1269 B. S. appointed on the 15th September, 1862, Mokhtars to apply on his behalf to the revenue authorities for 'mutation of names in his favour, and that on 10th November, 1862, he gave to the Deputy Collector the following acknowledgment of having received a pottah:—

"Holding No. 21-1.—Bounded as on the map and on the pottah.

"I, Syed Abdul Ali, do hereby acknowledge to have received a pottah for (17-5 4-2) of ground found by survey to be contained in

(1) (1912) L. R. 39 I. A. 177; I. L. R. 39 Calc. 981; 15 C. L. J. 620.

the above Holding and assessed at the rent of Company's Rs. 20-12-4 per annum and I give this document as my kabuliyat, consenting to pay the above annual jumma. Dated the 10th day of November 1862.

"SYED ABDUL ALI.
"Through the pen of
"BIPRADAS BOSE,
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The pottah was evidence of his title to possession. In exchange for the pottah Syed Abdul Ali gave to the Deputy Collector on the 10th November, 1862, a kabuliyat which so far as is material was as follows :—

"Holding No. 20-1.—Boundaries as shown on the pottah and map.

"This deed of kabuliyat is executed by Syed Abdul Ali to the following effect :—

"That I have got a permanent mourasi pottah in respect of lands measuring 17 bighas 5 cottahs 4 chattaks and 10 gundas the particulars of which are stated above, acknowledging as yearly rent thereof at Company's Rs. 20-12 annas 4 pies. I shall pay the rent year by year. Accordingly on receiving a pottah I execute this kabuliyat. Finis. The 10th November 1862."

Apparently, Syed Abdul Ali held direct from the Crown and not as an under-tenant, but whether his holding was recognised by the Government as an "estate" their Lordships do not know. Admittedly and obviously the holding of Syed Abdul Ali of 1862 was subsequently partitioned and after that partition the yearly revenue of the partitioned part which was sold by the Collector was Rs. 6-10 annas, 5 pies.

By section 2 of Act XI of 1859, it is enacted that :—

"If the whole or a portion of a Kist or instalment of any month of the era, according to which the settlement and Kistbundes of any Mohal have been regulated, be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue."

By section 3 of that Act it is enacted so far as is material as follows :—

"Upon the promulgation of this Act, the Board of Revenue at Calcutta shall determine upon what dates all arrears of revenue and all demands which by the Regulations and Acts in force are

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directed to be realized in the same manner as arrears of revenue, shall be paid up in each district under their jurisdiction, in default of which payment the estates in arrear in those districts, except as hereinafter provided, shall be sold at public auction to the highest bidder."

According to the notification of the Board of Revenue, in force at the date of the sale here in question, the 28th. June, 1914, was the day when the arrears of revenue which had become due for 1320 B.S. should be paid.

The kabuliyat given by Syed Abdul Ali in 1862 does not expressly state when the yearly revenue should be paid. The learned Subordinate Judge came to the conclusion that the letting was for the Bengali year, and having regard to Act XI of 1859 and the notification of the Board of Revenue which was applicable at the time of the sale, he found that one year's revenue, Rs. 6, 10 annas and 5 pies, was due on the 1st May, 1914 and was in arrear on the 17th May, 1915, and that the sale was consequently a valid sale.

The learned Judges of the High Court construed Syed Abdul Ali's kabuliyat of 1862 as a letting by which the yearly rent should be payable not at the end of the Bengali year but on the 10th November during the tenancy, and finding that in that view of the case there was no revenue in arrear at the date of the sale, for which the estates could be sold they held that the sale was invalid and dismissed the suit.

In their Lordships' opinion the learned Judges of the High court misconstrued the kabuliyat of 1862 in holding that by it the letting was a yearly letting from the 10th of November and not for the Bengali year, and incorrectly found that at the date of the sale there was no arrear of revenue for which the Collector could sell the estate. The 10th November, 1862, was merely the date when Syed Abdul Ali signed the kabuliyat; he had in September, 1862, taken over a then existing tenancy of the estate. It appears from the accounts in the Collector's office that the tenancy was for the Bengali year. Although the accounts relating to this estate which were kept in the Collector's office may not be in some matters easily understood by those who are not familiar with the system of keeping accounts in Collector's offices in that part of India, it has not been proved that they were not correctly kept by the native clerk in the office who was under the supervision of the Collector, who would understand what those accounts showed, and their Lordships are entitled to presume, and do presume, under section 114, Illustrations (e) and (f), of the Indian

Evidence Act of 1872, that they were correctly kept, and that there was a Government Revenue of Rs. 6, 10 annas and 5 pies in arrear for 1320 B. S. to realize which the estate might have been, and was in fact, sold on the 17th May, 1915, by the Collector.

There remains to be considered the issue as to whether the defendants were or were not protected by the exceptions of Section 37 of Act XI of 1859, or by the exceptions of section 12 of Bengal Act VII of 1868.

The learned Subordinate Judge considered all the evidence in any way relating to the tenure of the defendants, and he found that none of those under-tenures was shown to have existed at the time of the Permanent Settlement, and that none of the defendants was within the fourth exception of section 12 of Bengal Act VII of 1868. With those findings their Lordships agree. It may, however, possibly be, as the plaintiff's case in his plaint apparently was, that this was the case of a sale of an estate under Act XI of 1859 and not of a tenure not being an estate under section 11 of Bengal Act VII of 1868, and consequently that the exceptions to be considered were the exceptions of section 37 of Act XI of 1859 and not the exceptions of section 12 of Bengal Act VII of 1868. That question has not been considered by either of the Courts below, and on the evidence before their Lordships they are unable to decide it. In these consolidated appeals, however, the question as to whether the defendants were within the exceptions of section 37 of Act XI of 1859 or were within the exceptions of section 12 of Bengal Act VII of 1868, is not substantially material, as it has not been proved that the third exception of section 37 of Act XI of 1859 or the third exception of section 12 of Bengal Act VII of 1868 applies to the defendants or to any of them, and the wording of the fourth exception of section 37 of Act XI of 1859 and of the fourth exception of section 12 of Bengal Act VII of 1868 are for present purposes practically the same, as it is not suggested that in any of these under-tenancies mines have been sunk, and the gardens of the fourth exception of section 37 of Act XI of 1859 must mean permanent gardens. There was some evidence that there were wells on the lands, but they seem to have been very shallow and small wells, and not such wells as were meant by the fourth exception, and it has not been suggested that this exception would apply to them. The Subordinate Judge did not refer to the evidence of Baiju Nunia, who said that on one of these under-tenancies there was a two-storied pucca house. Probably the Subordinate Judge thought that that witness's evidence was not worth considering,

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In their Lordships' opinion it was worthless. No one else said that there was a pucca two-storied house on any of the holdings, and the witness, when he gave his evidence, was about 80 years of age and had been blind for 10 years.

Before concluding this judgment, their Lordships must allude to the fact that the learned judges of the High Court, before whom the appeal to their Court was heard, did not express any opinion as to whether the defendants or any of them were protected from ejectment by any of the exceptions of section 37 of Act XI of 1859 or of section 12, Bengal Act VII of 1868. The issue on that subject was before them and they should have considered it and found upon it. Their Lordships will quote for the information of those learned judges what Lord Justice Turner in delivering the judgment of the Board in *Tarakant Bannerjee v. Puddomoney Dossee and others* (1), said as to the duty of High Court judges to pronounce their opinions on all important issues in cases before them. The Lord Justice said :—

"The cause has not been decided in either Court on the principal point—whether the lands formed part of the *jote* tenure or of the *Talook*. Their Lordships are unfortunately unable to decide this appeal finally by reason of this defect. The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this Committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired, therefore, that in appealable cases the Courts below, should, as far as may be practicable, pronounce their opinions on all the important points."

Their Lordships will humbly advise His Majesty that these consolidated appeals should be allowed with costs, the decrees of the High Court should be set aside with costs and the decrees of the Subordinate Judge should be restored.

Watkins & Hunter: Solicitors for the Appellant.

T. L. Wilson & Co: Solicitors for Respondents.

Pugh & Co: Solicitors for Manmatha Nath Mullick (respondent in the second appeal).

K. V. L. N.

Appeal allowed.

(1) (1866) 10 M. L. A. 476. (488).

PRESENT : *Lord Buckmaster, Sir John Edge, Sir Lawrence Jenkins and Lord Salvesen.*

P. M. SADASIVA MUDALIAR AND OTHERS

v.

A. R. HAJEE FAKEER MAHOMED SAIT AND SONS.

(ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.)

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October, 27, 30.
November, 24.

Hindu joint family—Madras Presidency—Business contract—Liability of members taking benefit.

Two members of a Hindu joint family in the Madras Presidency, consisting of three adults and a minor, executed a letter to the respondents' firm and borrowed money for the purpose of starting and carrying on a brewery business. The other adult member acted as unpaid agent of the business at Madras and otherwise accepted the benefit of the contract. None of them possessed any property other than the joint family property in which the minor is also interested :

Held, that the members of the joint family who were parties to the contract or accepted it as such, cannot escape their liability to perform it or pay damages for the non-performance of it on the ground that they have no property other than the joint family property ; and it is unnecessary to consider the position in other provinces under similar circumstances.

Appeal from a decree of the Madras High Court, varying a decree of the Subordinate Judge of the Nilgiris.

The suit was instituted by the respondents against the appellants in the Court of the Subordinate Judge of the Nilgiris for recovery of Rs. 50,000 and interest, on the basis of a letter of the 5th January 1916. Appellants 1 and 2 raised the defence that the letter was not a completed contract as all the parties intended to be jointly bound by it did not sign it. The third appellant denied liability on the ground that the contract was not for the benefit of the family and that it was not within the powers of the manager of the joint family to make it.

The Subordinate Judge held that the contract was binding on all the appellants but decreed the plaintiffs' claim to the extent of Rs. 20,000 and interest. On appeal the High Court agreed with the trial Judge as to the liability of the appellants and held that the respondents were entitled to the Rs. 50,000 and interest. They accordingly varied the decree of the trial Judge. Hence the present appeal.

The facts are fully set out in their Lordships' judgment.

Clauston K. C. and *Dube* for the Appellants argued that the letter of the 5th January 1916 did not amount to an agreement binding on the appellants or any of them ; that the claim of Rs. 30,000 as bonus

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was not tenable : that the appellants have no property besides the immovable property of the joint family in which their minor brother is equally interested with them : that the letter being unregistered, could not affect the immovable property ; and that the liability of the 3rd appellant was not made out.

De Gruyther R. C. and *Brown* for the Respondents argued that there are concurrent findings as regards the 3rd appellant's liability and that the judgment of the High Court was right.

The judgment of their Lordships was delivered by

November, 24.

Sir John Edge :—This is an appeal from a decree, dated the 25th March, 1919, of the High Court at Madras, which varied in plaintiffs' favour a decree, dated the 11th August, 1917, of the Subordinate Judge of the Nilgiris in Civil Suit No. 67 of 1916. The suit relates to a contract which was made and to be performed in the Presidency of Madras.

The defendants, who are the appellants here, are P. M. Sadasiva Mudaliar, defendant 1 ; P. M. Gurusamy Mudaliar, defendant 2, and P. M. Pasupathy Mudaliar, defendant 3. They and their youngest brother, who is a minor and is not a party to this suit, constitute a joint Hindu family. When this suit was instituted on the 4th October, 1916, defendant 1 was 40 years of age, defendant 2 was 35 years of age, and defendant 3 was 22 years old. They were sons of P. Marudachala Mudaliar, who died in 1906. This joint family carried on business as owners of lands and house property in the Nilgiri District, and in the purchase and sale of hides, and as commission agents for the sale of beer brewed at the Rose and Crown Brewery, of which brewery the father had been a director. In the office of director of that brewery the father was on his death succeeded by his son the defendant 1. The joint family business was carried on under the names of P. M. Marudachala Mudaliar and Sons and P. M. Sadasiva Mudaliar and Brothers. In the father's lifetime he had acted as the manager for the joint family with the assistance of his eldest son, and since the father's death the defendant 1, with the assistance of the defendant 2, managed the family business.

On the 8th April, 1915, the plaintiff firm obtained against persons who constituted the firm of Rangayya Goundan and Company, a decree for sale of two breweries, known as the Nilgiri Brewery of Ootacamund, and the Castle Brewery, of Aruvanghat, in default of payment of Rs. 1,81,429 odd, interest thereon and costs. The plaintiff firm claiming that more was due to them in that suit,

appealed to the High Court. While that appeal was pending these defendants 1 and 2, on the 6th December, 1915, agreed (Exhibit H) with Rangayya Goundan, one of the judgment-debtors of the 8th April, 1915, to purchase the two breweries, free from all encumbrances, for a sum of Rs. 3,70,000, of which Rs. 1,83,000 were to be paid into Court on or before the 3rd January, 1916, in satisfaction of the decree of the 8th April, 1915. These defendants 1 and 2, not having the money with which to pay the Rs. 3,70,000, applied to the plaintiffs' firm for financial assistance, and on the 31st December, 1915, an agreement (Exhibit AA) was drawn up as between these three defendants and their minor brother through his guardian, who were described as the mortgagors (that term to include them and each of their heirs) of the one part and the plaintiff firm of the other part, whereby the plaintiff firm agreed to advance to the mortgagors four lakhs of rupees at 12 per cent. per annum interest on the security of the two breweries, and of other property which was property of the joint family. The four lakhs of rupees were to include a bonus of Rs. 30,000 to the plaintiff firm for their assistance. The four lakhs of rupees were to be paid as follows:—To the mortgagees, the plaintiff firm, Rs. 1,83,000 or thereabouts, in satisfaction of their decree of the 8th April, 1915; to the mortgagors, Rs. 51,000 or thereabouts; to Mr. Branson in satisfaction of a decree obtained by him against Rangayya Goundan and Company, Rs. 86,000 or thereabouts; an undefined amount to be kept in reserve pending the decision by the High Court of the appeal by the plaintiff firm in the suit against Rangayya Goundan and Company, and Rs. 30,000 the bonus. The agreement was signed by the defendants 1 and 2, and by the defendant 1 as the guardian of their minor brother. The defendant 3 was at the time absent from his home at Ootacamund; he was in some country district, and did not sign the agreement, nor was he consulted about it.

It was found that the defendants 1 and 2 were not in a position to grant a mortgage of the two breweries, owing to the illness of Rangayya Goundan and to the widow and son of Nanjayya Goundan refusing to join in a conveyance of the breweries until certain claims which they made had been satisfied, and on the 5th January, 1916, the defendants 1 and 2 gave to the plaintiff firm the following letter:—

(Exhibit BB.)

" To Messrs. A. R. Hajee Fakeer Mahomed Sait and Sons.

"Ootacamund.

" We beg to inform you that we are unable to carry out at once

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as agreed upon the terms of our finance agreement of the 31st December, 1915 (hereinafter referred to as the agreement), on account of the delay in obtaining a proper conveyance of the Brewery properties from the vendor and all necessary parties.

"In the event of our not being in a position to execute the mortgage for Rs. 4,00,000 referred to in the agreement within two months from this date, we agree to take a transfer of the decree obtained by you against Rangayya Goundan and others on the 8th day of April, 1915, in O. S. No. 28 of 1910 on the file of the Sub-Court upon which the sum of Rs. 1,82,145-14-2 is now due and also any further decree that may be passed in your favour by the High Court on an appeal now pending from the said decree.

"In consideration of your making us an advance of Rs. 50,000 on our pronote on this date (Rs. 20,000 having been paid in cash and Rs. 30,000 being the bonus already paid by us to Mahomed Hashim Sait for his services for arranging the loan of Rs. 4,00,000 referred to in the agreement), we hereby agree to execute in your favour a legal mortgage of our properties set out in the agreement to secure the said sum of Rs. 50,000 and interest thereon as provided for in the agreement as and from the 5th day of January 1916.

"As to the transfer of the said decree amounting to Rs. 1,82,145-14-2 as aforesaid, we agree to execute a legal mortgage in your favour of our properties set out in the agreement as well as the said decree to be so transferred to secure the said sum of Rs. 1,82,145-14-2 with interest as provided for in the agreement as and from the 3rd day of January, 1916.

"As to any further amount that may be decreed on appeal by the High Court, we will execute a legal mortgage in your favour of our properties set out in the agreement and any excess amount so decreed and to be transferred as aforesaid to secure the excess amount decreed on appeal with interest as provided for in the agreement as and from the date of the appellate decree.

"Should the agreement to purchase the Breweries fall through, the agreement shall be restricted to the present advance of Rs. 50,000 and the amounts of the decree of the Sub-Court of the Nilgiris and of any further decree to be passed on appeal by the High Court.

"Dated this 5th day of January, 1916.

"(Signed) P. M. Marudachala Mudaliar and Sons.

"(") P. M. Sadasiva Mudaliar.

"(") P. M. Gurusamy Mudaliar.

„(") P. M. Sadasiva Mudaliar, guardian for
Rajababdur Mudaliar.

It will be observed that one of the signatures to the letter is in one of the business names of the joint family. The solicitor who acted for the plaintiff firm probably thought that by way of precaution the letter had better be also signed by the members of the family. The defendant 3 did not sign that letter of the 5th January, 1916, nor was he consulted about it. He was at that time still absent from home. The plaintiff firm agreed to the terms of that letter, and gave to the defendants 1 and 2 Rs. 50,000 by cheque, which was duly paid, and received from them the following promissory note :—

(Exhibit CC.)

"OOTACAMUND,

5th January, 1916,

"On demand we, P. M. Sadasiva Mudaliar and P. M. Gurusamy Mudaliar, jointly and severally promise to pay Messrs. H. A. R. Hajee Fakeer Mahomed Sait and Sons or order the sum of Rs. 50,000 with interest at 12 per cent. per annum for value received this day in cash.

"Fifty thousand only.

"P. M. Sadasiva
Mudaliar.

Signed on
one anna
stamp.

"P. M. Gurusamy
Mudaliar."

The defendants 1 and 2 were unable to come to an arrangement with the widow and son of Nanjayya Goundan, and consequently could not grant the mortgage of the two breweries. The two breweries were finally sold to the United Breweries Company. That Company, by payment of the amount due under the decree of the 8th April, 1915, discharged that decree.

The defendants 1 and 2 in December, 1915, entered into possession of the two breweries under their agreement with Rangayya Goundan, of the 6th December, 1915, and carried on the business of brewing at the breweries. They obtained in the name of P. M. Sadasiva Mudaliar and Brothers the necessary Government Abkari licence for the official year 1915-16. That licence was hung up in a prominent place in the brewery office. The business of brewing was carried on until the breweries were sold to the United Breweries Company.

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According to the evidence of defendant 3, he first became aware, in February, 1916, that the two breweries were being carried on by the defendants 1 and 2 and of the terms on which they had acquired an interest in the breweries. That may, in their Lordships' opinion be accepted as a fact. It appears that he had been advised by an uncle of his that the two breweries should not be treated as business of the joint family, and that on his return to Ootacamund in March, 1916, he informed his brothers the defendants 1 and 2, that he objected to the breweries being joint family business. As a matter of fact, the owning and carrying on of breweries was not business which had been carried on by the joint family, and was outside the scope of the business of the joint family. If that was his opinion, as it may be assumed it was at that time, he should have avoided taking any part in the management of the breweries, and in the sale of the beer brewed there. Probably he came to the conclusion that the breweries were or would be a profitable concern for him to have an interest in as a proprietor. Whatever his motive may have been, he acted at Ootacamund in the management of the two breweries from June until October, 1916. In October, 1916, a depot for the sale of the beer brewed at these breweries was started at Madras, and the defendant 3 took charge of that depot, which was carried on in one of the trading names of the joint family. Some of the cheques which were received at the depot in Madras in payment of money due for beer were endorsed by him in the name of P. M. Sadasiva Mudaliar and Brothers, and were paid by him into the account of the joint family with their bankers. Their Lordships will later express their opinion as to what are the inferences to be drawn from the acts of the defendant 3 in and after June, 1916, at Ootacamund and in Madras. It has not been suggested that he acted in the position of a paid manager or paid clerk.

This suit was brought on the 4th October, 1916, on the basis of the letter of the 5th January, 1916, the offer contained in it having been accepted by the plaintiff firm. The plaintiff firm claimed in their plaint Rs. 77,303-13-7, which represented the Rs. 50,000 which were advanced on the 5th January, 1916, and interest on that sum; interest on the sum of Rs. 1,82,145-14-2, the amount of the decree for sale of the 8th April, 1915; interest on Rs. 37,336-7-5, the additional amount which was allowed to them by the Appellate Court in the appeal from the decree for sale; and interest on the total amount of that Appellate Court decree by way of prospective damages; and the plaintiff firm prayed for a decree against the

defendants 1, 2 and 3 personally and against their family property in the hands of the defendants excepting the share in it of their minor brother. The defendants severed in the defences, the defendants 1 and 2 filed one written statement, and the defendant 3 filed two written statements. The defences pleaded, so far as they are now material, were briefly that the agreements of the 31st December, 1915, and of the 5th January, 1916, were not completed contracts, as they were not executed by all the parties intended to be jointly bound by them and could not be enforced against any of the defendants. That in view of the facts, as will later appear, was an untenable defence. It was further pleaded by the defendant 3 that the agreements were not for the benefit of the joint family, and were not within the powers of the manager of a joint family to make. The defendant 3 also specially pleaded that he was not consulted about the agreements, and was not bound by them. The defendants 1 and 2 in their written statement, admitted their liability to pay Rs. 20,000 of the Rs. 50,000.

The learned Subordinate Judge who tried the suit and heard the witnesses giving their evidence, observed in his judgment :—

“The facts of the case not being complicated, and covering as they do a comparatively short period, the oral evidence in the case is, on the whole, short: the questions in issue are in the main questions of construction and questions of law. Despite, however, the essential simplicity of the facts, there has been in the case an unusual amount of hard swearing on the part of the four parties to the suit that have been examined, a most regrettable feature of the case having regard to the fact that the plaintiffs and the defendants occupy a very leading position in their respective communities.”

The four parties to the suit who gave evidence were the defendants 1, 2 and 3 and the managing member of the plaintiff firm. As regards the defendant 3, the Subordinate Judge also said in his judgment :—

“As regards Pasupathy Mudaliar, I do not think he is speaking the truth when he tries to dissociate himself as much as possible from the brewery business which was actually being carried on in the name of the family firm and in which he actually took part between June, 1916, and January 1917, in Ootacamund and in Madras. He has tried hard to fight shy of even an ocular acquaintance with the contents of the licence in the name of the firm that was hung up in the brewery. I cannot agree with him when he pretends that he was an independent member of his joint family on the same footing as his senior brothers. I do not believe him when he says

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that he told his elder brother in September, 1915, that he would not be bound by their forming a syndicate to buy the breweries." and :—

"As already indicated in the summary of facts, the 3rd defendant after July, 1916, took an active, though subordinate, part in the brewery business which defendants 1 and 2 wanted to acquire for the family. The reasonable inference to be drawn is that he ratified those acts of the defendants 1 and 2 under which they bound themselves to acquire the breweries, e.g., the agreements H and J and those acts under which defendants 1 and 2 obtained authority from the Board of Revenue to carry on the brewing business and to open a depot in Madras. But this does not indicate that he ratified those acts of defendants 1 and 2 which are referable to the particular method of acquisition which the defendants 1 and 2 wished to adopt; and I may say that there is absolutely no evidence whatsoever which shows that the 3rd defendant ratified Exhibits AA, BB or CC except to the extent of the sum of Rs. 2,000-0-0 which forms a portion of the consideration of the Exhibit CC promissory note. I make this exception, as in the absence of the account books of the family, I must presume, that this sum of Rs. 20,000-0-0 actually received by defendants 1 and 2 has passed into the family accounts, and on the ground that the implied authority given by the 3rd defendant to defendants 1 and 2 by way of ratification to acquire the breweries necessarily implies an authority to borrow the required money under *ordinary* conditions; and the borrowing of Rs. 20,000 only at 24 per cent. for the purpose of making up Rs. 3,70,000-0-0, the sale price of the breweries, *prima facie* amounts to borrowing under ordinary conditions."

In conclusion the Subordinate Judge, disallowing all plaintiff company's claims except as to Rs. 20,000, made the following decree :—

"It is ordered and decreed that the defendants 1 to 3 do pay to the plaintiffs the sum of Rs. 21,800-0-0 (being principal—Rs. 20,000 and interest thereon at the rate of 12 per cent. per annum from 5th January, 1916, to date of suit, 4th October, 1916.—Rs. 1,800-0-0), out of the amount sued for, with interest on Rs. 20,000-0-0 at the rate of 12 per cent. per annum from 5th October, 1916, to this date, viz., 2,040-0-0, and with further interest on the aggregate amount of Rs. 23,840-0-0 at the rate of 6 per cent. per annum from this date to the date of realization, and that the defendants 1 to 3 do also pay to the plaintiffs the sum of Rs. 682-2-0 on account of the proportionate costs of the suit, with interest thereon at the rate of 6 per

cent. per annum from this date to the date of realization, subject, however, to the reservation that the 3rd defendant's liability is restricted to his share in the family property only.

"It is further ordered that the defendants 1 to 3 will not get their proportionate costs on the amount disallowed to the plaintiffs and do bear their own costs."

It is not clear why the Subordinate Judge did not decree payment of the Rs. 50,000, instead of Rs. 20,000 only. If he had been consistent, he would have decreed payment of the larger amount.

From the decree of the Subordinate Judge the plaintiff company appealed to the High Court. The leading judgment in the High Court was delivered by Abdur Rahim, J. In his judgment, he said :—

"The main question argued both in the Lower Court as well as before us is whether the agreement, Exhibit BB, was a contract at all, that is to say, whether the agreement was to be regarded as complete and binding since the 3rd defendant in the suit, Pasupathy Mudaliar, did not sign it. It is signed by 'P. M. Marudachala Mudaliar and Sons'—that is the name of the family firm of the Mudaliars—and also by the 1st defendant, Sadasiva Mudaliar, the 2nd defendant, Gurusamy Mudaliar, and by Sadasiva Mudaliar as guardian for Rajabahadur Mudaliar, minor brother of the defendants. I have no hesitation whatever in accepting the evidence of Mr. Walker that the parties expected that the third brother, Pasupathy Mudaliar, also would execute the agreement. The promissory note, Exhibit CC, is signed only by Sadasiva Mudaliar and Gurusamy Mudaliar, 1st and 2nd defendants. The question with respect to both the documents is whether they are to be regarded as completed transactions or whether it was the intention of the parties that there was to be no binding contract until the 3rd defendant, Pasupathy Mudaliar, joined in executing Exhibit BB. The learned Subordinate Judge has held that the agreement was conditional, that is, it was not to take effect until it was executed by Pasupathy Mudaliar. It seems to me, however, that the admitted and clearly established facts of the case point to an opposite conclusion. There can be no doubt whatever, as already stated, that both the parties intended that Exhibit BB should be binding on the entire family. At the same time, it is equally clear to me that the parties intended that, if all could not be bound, at least those who signed in their individual capacity, would be bound. The Saits had left the matter in the hands of their legal adviser, Mr. Walker, and

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the evidence also shows that the Mudaliars were represented by a Pleader, Mr. Rama Row, who, however, has not been examined in the case. There was considerable discussion between different parties and their lawyers as to what should be the exact nature of the arrangements. The result of the evidence amounts to this—that since there was difficulty as mentioned in Exhibit BB itself as to getting the necessary parties to join in the conveyance of the breweries to the Mudaliars, the expedient that they hit upon was that the Mudaliars should take a transfer of the decree of the Saits. With that decree in their hands they expected that there would be no great difficulty in securing the breweries. The Mudaliars wanted the breweries for the benefit of the entire family, which consisted of three adults and one minor brother, but the lawyers of the parties thought that difficulty might arise in binding the entire family, as questions might be raised as to whether the transaction was a proper one for the benefit of the family. Mr. Walker's evidence makes it clear that under the circumstances, he thought it expedient and advisable that the agreement should be signed not only by the firm or in the firm's name, but by the Mudaliars individually. The plaintiff's object in that was that if it so happened that the transaction did not come within the scope of the family business which consisted mainly in plantations, the members of the family who signed the agreement would be bound by them. The 3rd defendant was at the time not in Ootacamund, and that was the reason why he did not actually sign Exhibit BB, but he was expected to sign it, and the evidence is that the 1st defendant, who is the head of the family, being the elder brother, undertook to obtain the signature of Pasupathy Mudaliar. Mr. Walker positively swears that it was never suggested or understood that Exhibit BB would not come into operation unless or until Pasupathy signed it. There is not the slightest reason to doubt the *bona fides* or accuracy of his statement. And it clearly could not have been the intention of the parties that Exhibit BB was to have no effect whatever until the third brother signed it.

Their Lordships agree with all that the learned Judge said on that subject. As to the liability of defendant 3, he said that—

“It cannot be disputed that at least from June, 1916, he took a very active part in the business of the breweries. He was in charge of the depot in Madras for some time according to the arrangement with the Excise authorities (their licence); he received monies from the family to funds (with which to carry on the business), and paid the profits of the business into the family account with the

bank. He also signed cheques in the name of the family firm of Marudachala Mudaliar and Sons and Sadasiva Mudaliar and Brothers, and there cannot be the least doubt that he regarded the business as much his own as that of the 1st and 2nd defendants."

Their Lordships are not aware that the defendant 3 ever signed any cheque in the name of either of the joint family firms, if that is what the learned Judge meant in the passage quoted; but he probably meant that the defendant 3 had endorsed some cheques in the name of the firm, and with that explanation their Lordships agree with the finding quoted. Further on the learned Judge found "the evidence clearly shows that he (the defendant 3) treated and adopted the whole transaction as one in which he was interested as much as the 1st and 2nd defendants," and he also found that the defendant 3 ratified and adopted the transaction of the 5th January, 1916, by his subsequent conduct, and made himself liable by adopting that contract. Spencer, J., in a short judgment, agreed with Abdur Rahim, J., and said, "I also agree in thinking that the 3rd defendant, by his subsequent conduct, ratified and acquiesced in the agreement when he joined with his brothers in managing the brewery business in 1916." The result was the High Court gave the plaintiff firm a decree for Rs. 76,159-5-7, which included the Rs. 54,359-5-7, which had been decreed by the Subordinate Judge, and with some future interest at 6 per cent.

From that decree of the High Court this appeal has been brought. Their Lordships agree with the findings of the High Court, which they have quoted from the judgments delivered in that Court. There can be no doubt the business of owning and carrying on breweries was not a business of the joint family, and that the minor brother, when he comes of age, can repudiate the contract of the 5th January, 1916, so far as he and his interest in the joint family property are concerned, and that his interests in the joint family property cannot be affected by this suit. The contract of the 5th January, 1916, cannot be regarded as a contract of the joint family of which the minor brother is a member, but defendant 3 accepted that contract as binding on him, and derived benefits under it and consequently accepted it, with liability to perform it; the money which was advanced under it by the plaintiff firm was money which was required for the starting and carrying on of the brewing business. It appears to their Lordships that it is a contract which is binding on those members of the joint family, the defendants 1, 2 and 3, who were parties to it or accepted it as a contract, and that they cannot escape their liability to

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perform it or to pay damages for the non-performance of it by showing that they have no property except that which is property of the joint family in which their minor brother is equally interested with them. If it were the law that some members of a joint family could escape from liability to perform contracts entered into by them on the grounds that their contracts were not such as would bind the joint family, and that they had no property other than that which was the property of the joint family, it would be necessary for every person with whom they sought to make a contract to assure himself that the business to which the proposed contract would relate was business of the joint family, and that no member of the joint family was a minor. Under such circumstances, it would be difficult to carry on business with persons who happened to be members of a joint family of the Province of Madras. What might be the position in other Provinces it is unnecessary to consider. The decree in this suit cannot be executed against the minor's interest in the joint property of the family.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Hy. S. L. Polak: Solicitor for Appellants.

Douglas Grant: Solicitor for Respondents.

K. V. L. N.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice Chotzner.

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1922.

June, 14, 15.

PRAN KRISHNA TARAPDAR AND OTHERS

v.

PRASANNA KUMAR PAKRASHI AND OTHERS.*

Second appeal—Misconstruction—'Jalkar'-Evidence.

A second appeal does not lie because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of it. The misconstruction of a document which is the foundation of the suit, which is in the

* Appeal from Appellate Decree No. 213 of 1920, against the decree of Durga Das Chakrabarti Esq. District Judge of Pabna dated the 22nd August, 1919, reversing that of Babu Purna Chandra Basu, Subordinate Judge of Bogra, dated the 28th March, 1917.

nature of a contract or a document of title is allowed to be a ground for second appeal : *Nombut v. Chutter Dharee* (1).

The term 'jalkar' is ambiguous. It may mean either a grant of a mere right of fishery or it may mean the grant of a sheet of water together with the sub-soil : *Bissen Lal v. Khyrunnissa* (2), and other cases.

The question whether what was intended to be granted in a particular case was restricted to a right of fishery or included a grant of a sheet of water together with the sub-soil, depends upon the construction of the original grant if available or is determined with regard to the subsequent history of the property.

Appeal by the Defendants.

Suit for recovery of possession of land on declaration of title.

The material facts appear from the judgment.

Babus Sharat Chunder Roy Chowdhury and *Indu Bhusan Roy* for the Appellants.

Babus Dwarka Nath Chuckerbutty, *Biraj Mohan Majumdar*, *Sasadhar Roy* and *Jatindra Nath Sanyal* for the Respondents.

C. A. V.

The judgment of the Court was delivered by

Mookerjee, J : This is an appeal by the defendants in a suit for recovery of possession of land on declaration of title. The case for the plaintiffs is that the disputed land is comprised within a permanently settled estate held by them within the collectorate of the district of Bogra and known as Mahal Dihi Adgola. The defendants contend that the land is not comprised within the permanently settled estate of the plaintiffs but lies outside its ambit and has accreted to the neighbouring permanently settled estate held by themselves. They further contend that the claim of the plaintiffs is barred by limitation. The Court of first instance found upon the question of title in favour of the plaintiffs but dismissed the suit on the ground of limitation. Upon appeal the District Judge has affirmed the conclusion of the Subordinate Judge upon the question of title but has reversed his decision upon the question of limitation. The result has been that the suit has been decreed.

On the present appeal the decision of the District Judge has been assailed on the ground that his conclusion upon the question of title is erroneous in law. It is not disputed that the land in suit formed at one time the bed of a beel called Beel Nurail known also as Jalkar Sat Simulia. The plaintiffs asserted that at the time of the Permanent Settlement the bed of this jalkar was settled with their predecessors as included in the permanently settled estate granted

(1) (1873) 19 W. R. 222.

(2) (1864) 1 W. R. 78.

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to them. The defendants do not controvert the position that the land was at the time of the Permanent Settlement covered with water but they contend that what was settled with the predecessors of the plaintiffs was nothing beyond the right of fishery and that the bed of the jalkar remained with the Crown. The grant made at the time of the Permanent Settlement has not been produced and consequently no question arises as to the construction of the fundamental title deed. The plaintiffs as also the defendants have accordingly been constrained to rely upon subsequent documents which disclose various transactions connected with the disputed land or with the Jalkar, and the Courts below have thus been called upon to ascertain from the subsequent history of the disputed land the nature of the initial grant. *Prima facie* this does not raise a question of law which can be investigated in second appeal. It was pointed out by Sir Richard Couch C. J. in *Nowbut Singh v. Chutter Dharee Singh* (1), that a special appeal does not lie because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of it. For instance, a writing supposed to contain an admission may be put in as part of the evidence but a mistake in its meaning is not a misconstruction of a document upon which a special appeal will lie if it is connected with other evidence affecting its construction. The misconstruction of a document which is the foundation of the suit, which is in the nature of a contract or a document of title is allowed to be a ground for a second appeal. As we have already stated the original grant is not available and consequently no question arises as to its legal construction.

The appellants have however attacked the judgment of the District Judge on the ground that he has lost sight of a very important distinction in connection with the meaning of the expression 'Jalkar.' We are of opinion that this charge cannot be justified. It is well known that the term 'Jalkar' is ambiguous. It may mean either a grant of a mere right of fishery or it may mean the grant of a sheet of water together with the sub-soil. This is pointed out in a long series of decisions from *Bissen Lal Dass v. Khyrunnissa Begum* (2) to *Makananda Chakravarty v. Mongala Keotani* (3). Amongst the intermediate decisions, the more important are those in *Radhamohun Mundul v. Neel Madhub Mundul* (4); *David v. Grish Chunder Guha* (5); and *Rakhal Churn Mundul v. Watson & Co.* (6).

(1) (1873) 19 W. R. 222.

(2) (1864) 1 W. R. 78.

(3) (1904) 1 L. R. 31 Calc. 937.

(4) (1875) 24 W. R. 206.

(5) (1882) 1 L. R. 9 Calc. 183.

(6) (1883) 1 L. R. 10 Calc. 50.

The distinction is also emphasised in the decision of the Judicial Committee in *Radhagobind Roy Sahab v. Inglis* (1). The question whether what was intended to be granted in a particular case was restricted to a right of fishery or included a grant of a sheet of water together with the sub-soil must depend upon the construction of the original grant if available or must be determined with regard to the subsequent history of the property. In the present case the Subordinate Judge has pointed out that the entries in the two registers known as A Register and B Register maintained under the Land Registration Act 1876 undoubtedly support the contention of the plaintiffs. The B Register shows that the Jalkar Sat Simulia alias Beel Nurail is one of the mouzas comprised in the permanently settled estate Mahal Dihi Adgola and that the area of the mouza is 1051 acres and 13 poles. It is improbable that there should be a reference to the area if the right which the proprietors received from the Crown was a right of fishery. The entry in the A Register supports the conclusion that the grant included the sub-soil. That entry shows that Rs. 5504-6 as. was the amount of land revenue payable for the entire estate; that is, in respect of all the mouzas comprised in the estate inclusive of the jalkar mouza. This conclusion is borne out by the revenue survey map which shows that the area of the jalkar mouzah which, at the date of the survey in 1854, was all water, corresponds also with the area as subsequently shown. The thak survey which preceded the revenue survey resulted in a map which supports the same conclusion. The Courts below were however pressed with the proceedings of the Collector under Act IV of 1840 which supports the contention of the defendant. We are not concerned in second appeal with the weight to be assigned to the different pieces of evidence on the record; and it is not open to us to examine whether the Courts below have properly given preference to the documents which we have mentioned first. But apart from all this, the outstanding fact remains that if the grant made at the time of the Permanent Settlement was in respect of the fishery right alone, the Crown has not taken steps to resume the land after the beel had dried up and to assess the land with revenue. The fact that the beel has dried up has been known to the revenue authorities and they have for more than quarter of a century allowed the plaintiffs to remain in occupation through their tenants of a large tract of land. Consequently, we cannot justly hold that what was granted was a franchise or an incorporeal right

(1) (1880) 7 C. L. R. 364.

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of fishery and not a territorial right. Evidence of a conclusive character would be required to justify the theory that in respect of a mouza comprised within the ambit of a permanently settled estate there was no grant of the sub-soil to the grantee and that what was granted was a mere fishery right—the right to the subsoil remaining in the Crown. Such a conclusion would be opposed to the decision of this Court in *Mathura Nath Chattopadhyaya v. Sib Chandra Bose* (1). It is plain that the defendants have no title whatsoever in the disputed land; it is not comprised within their permanently settled estate; nor can we conceive by what possible means they may have acquired title by accretion. The land never formed the bed of a public navigable river; it has not been claimed as land which has emerged from recession of a river; it has been made culturable because the beel has dried up. In circumstances like these, it is impossible to conceive how the defendants can successfully claim title by accretion. The only chance of the defendants was to prove title by adverse possession; in this they have failed according to the judgment of the District Judge. Upon the question of title, there is the concurrent decision of two Courts in favour of the plaintiffs; that decision has not been challenged on grounds admissible in second appeal.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1907) 12 C. W. N. 334.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Chotener.*

HON'BLE KUMAR ARUN CHANDRA SINHA BAHADUR

AND OTHERS

v.

MANMOHAN SINHA ROY AND OTHERS.*

Civil.

1929.

July, 12.

*Embankment—Bengal Embankment Act (II B. C. of 1882), Sec. 68—Erroneous
order—No specification of instalments—Jurisdiction.*

There was an order under the Bengal Embankment Act for apportionment made by the Collector as between the proprietors on the one hand and the tenure-holders on the other. This order was made after due service of notices on the tenure-holders. The order did not specify the instalments and the dates on which the sum included in each instalment was to be made payable. The final order was served upon the tenure-holders and no objection was taken to it. The proprietors paid the amount due to the Collector in one instalment in accordance with that order. They then instituted the present suit for recovery of the amount from the tenure-holders. The tenure-holders objected that they were not liable to pay the entire amount in one instalment. The Courts below made a decree in favour of the plaintiffs, only in respect of such sums as would have been payable by the tenure-holders if an order for payment by instalments had been correctly made by the Collector :

Held, that it was not open to the Courts below to adopt this method of granting relief to the plaintiffs and that the plaintiffs were entitled to a decree for the amount claimed by them.

That the order of the Collector, though erroneous, was made in the exercise of jurisdiction.

That it was not open either to the plaintiffs or the defendants to ignore the order which was made by the Collector : *Hriday v. Ram Chandra* (1).

Appeal by the Plaintiffs.

Suit for recovery of money paid by the plaintiffs as proprietors of an estate under the Bengal Embankment Act.

Babus Joges Chandra Roy and Ramani Mohan Chatterjee for the Appellants.

Babu Narendra Kumar Bose for the Respondents.

* Appeal from Appellate Decree No. 2327 of 1920, against the decree of J. W. Nelson Esq., District Judge of Howrah, dated the 28th May, 1920, affirming that of Babu Bijoy Gopal Chatterjee, Subordinate Judge of Howrah, dated the 29th July, 1919.

(1) (1920) 1. L. R. 48 Calc. 138; 31 C. L. J. 482.

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Arun Chandra

v.
Mannohan.

July, 12.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the plaintiffs in a suit for recovery of money paid by them as proprietors of an estate under the Bengal Embankment Act, 1882. The defendants are tenure-holders under the plaintiffs, and the question in controversy is, whether the plaintiffs are entitled to recover the disputed amount in one sum from the defendants. The Courts below have held that the plaintiffs are entitled to recover only a portion of the sum claimed. The payment was made by the plaintiffs pursuant to an order made by the Collector under the provisions of the statute. There is no room for dispute that the order of the Collector was erroneous inasmuch as it did not specify the instalments in which the same was payable to the Government. What we have to consider is whether the validity of the order of the Collector can be questioned before the civil Court in this litigation; for this purpose, we must refer to the relevant sections of the Bengal Embankment Act.

Section 54 provides that the costs are to be paid by the proprietor to the Collector. Section 55 provides that the proprietor is entitled to recover, from the tenure-holders under him, the sum apportioned to each tenure-holder. Section 59 authorises the Collector to make the apportionment among the several tenure-holders under the proprietor. Section 61 then lays down an important principle in the following terms: "The amount charged to or apportioned on any estate or tenure shall be payable in equal instalments on such days as the Lieutenant-Governor shall direct, provided no instalment shall exceed four annas for every acre of land in respect of which the same is payable, and that not more than four instalments shall be payable in any one year." Section 68 deals with the final order of apportionment and provides that the Collector shall make an order specifying the tenures in respect of which any sum apportioned is payable and the sums payable in respect of each of the instalments of such sums and the dates on which such sums are payable. Section 69 deals with the publication of the final order of apportionment and provides that the Collector shall cause a copy of such order to be published either in a general notice stating the amount apportioned or cause special notices to the same effect to be served in respect of every tenure on or among the zemindars or tenure-holders of which any sum is charged or apportioned. Section 74 deals with the recovery by proprietors to whom any sum or instalment is payable under an order made in pursuance of section 68. Section 84 provides for

an appeal from orders passed by the Collector under various sections including section 68. Section 85 provides for the general control of the Commissioner and Local Government. Lastly section 86 lays down that subject to the provisions of sections 84 and 85 every order passed by the Collector in respect of applications under section 18 and every order passed under sections 11, 50, 52 or 68 and every order passed by a controlling authority in respect of such order of a Collector shall be final and not liable to be modified or altered otherwise than as expressly provided in the Act.

Now in the case before us there was an order for apportionment made by the Collector as between the proprietors on the one hand and the tenure-holders on the other. This order was made after due service of notices on the tenure-holders. This order was defective inasmuch as it specified merely the amount payable by the tenure-holders and the proprietors, but did not specify the instalments and the dates on which the sum included in each instalment was to be made payable. This final order was served upon the tenure-holders. It is remarkable that no exception was taken to this order, though it was manifestly erroneous, either by the proprietors or by the tenure-holders. The proprietors paid the amount due to the Collector in one instalment in accordance with that order. They then instituted the present suit for recovery of the amount from the tenure-holders. The tenure-holders objected that they were not liable to pay the entire amount in one instalment. The Courts below have made a decree in favour of the plaintiffs, only in respect of such sums as would have been payable by the tenure-holders if an order for payment by instalments had been correctly made by the Collector under section 68. The Courts below have in substance replaced the actual order of the Collector by an order which should have been made by him. We are of opinion that it was not open to the Courts below to adopt this method of granting relief to the plaintiffs.

It has however been contended on behalf of the defendant respondents that the order of the Collector was *ultra vires*; that is, made without jurisdiction. We are of opinion that this contention cannot prevail. The term "Jurisdiction" as pointed out in the case of *Hriday Nath Ray v. Ram Chandra Barna Sarma* (1) is often inaccurately used. There is a clear distinction between 'jurisdiction' and 'exercise of jurisdiction'. Since jurisdiction is the power to hear and determine a case, it does not depend either upon the regularity of the exercise of

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that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. As an authority for this proposition reference may be made to the celebrated dictum of Lord Hobhouse in *Malkarjun v. Narhari* (1): "A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however wrong, cannot be disturbed." Lord Hobhouse then added that though it was true that the Court made a sad mistake in following the procedure adopted, still in so doing the Court was exercising its jurisdiction; and to treat such an error as destroying the jurisdiction of the Court was calculated to introduce great confusion into the administration of the law. The boundary between an error of judgment and the usurpation of power is this: the former is reversible by an appellate Court within a certain fixed time and is therefore only voidable, the latter is an absolute nullity. So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect. Were it held that a Court had jurisdiction to render only correct decisions, then each time it made an erroneous ruling or decision, the Court would be without jurisdiction and the ruling itself void.

In the case before us the Collector passed an incomplete order. He determined the amount recoverable by the proprietors from the tenure-holders. He did not, however, specify, as he was bound to do, the instalments in which such sum was recoverable. That in our opinion did not destroy his jurisdiction, although the order was so manifestly erroneous that if he had been called upon to review it or if the matter had been brought to the notice of the appellate Court, the order would have been modified in accordance with law. We are consequently of opinion that it is not open either to the plaintiffs or the defendants to ignore the order which was made and that the plaintiffs are entitled to a decree for the amount claimed by them in this litigation.

The result is that this appeal is allowed, the decree of the District Judge modified and the suit decreed with costs in all the Courts. Interest will be calculated at 5 per cent per annum till the date of realisation.

A. T. M.

Appeal allowed: Decree modified.

(1) (1900) 1 L. R. 25 Bom. 337; L. R. 27 I. A. 216.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Chotzner.

AKSHAY KUMAR CHAND

v.

THE COMMISSIONERS OF BOGRA MUNICIPALITY.*

Lease—Chairman of Municipality granting lease—No resolution to grant the lease—Bengal Municipal Act (III B. C. of 1884), Secs. 34, 43, 44—Burden of proof—Requirements of statute—Presumption—Corporation, power of, nature and extent of—Rent, payment of, by lessee—Acceptance—Ratification—Minutes of proceedings of a meeting of the commissioners, copy of—Evidence Act (I of 1872), Sec. 78 (5).

A copy of the proceedings of a meeting of the Municipal commissioners, certified by the keeper thereof, is admissible in evidence, under sub-section (5) of section 78 of the Indian Evidence Act.

Where a corporation is constituted by a statute, all persons and corporations are presumed to know the nature and extent of its powers: *Macgregor v. Dover and Deal Railway Coy* (1).

A lease of the disputed land was granted by the Chairman of the Corporation in contravention of the Bengal Municipal Act. The lessee entered into possession and paid rent to the municipality for a period of six years. On the expiry of the term of the lease, the municipality requested the defendant lessee to vacate the land, but he insisted that the lease included a covenant for renewal which entitled him to continue in occupation. In a suit for ejectment:

Held, that the burden lay upon the lessee to establish that the requirements of the statute were fulfilled.

That as the transaction was *ultra vires*, it could not be validated by ratification, and the lessor was entitled to eject the defendant.

Appeal by the Defendant.

Suit for ejectment.

The material facts appear from the judgment.

Babus Sharat Chunder Roy Chowdhury and Indu Bhusan Roy for the Appellant.

Babu Atul Chandra Gupta for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal by the defendant in an action in ejectment. The disputed land was the subject matter of a

* Appeal from Appellate Decree No. 1173 of 1920, against the decree of Babu Durga Kanta Roy, Subordinate Judge of Bogra, dated the 8th March, 1920, affirming that of Babu Satis Chandra Sen, Munsif of Bogra, dated the 23rd July, 1919.

(1) (1852) 18 Q. B. 618 (631).

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lease granted by the Chairman of the Municipal Corporation at Bogra to the appellant on the 28th April, 1909. The document was registered on the 18th August, 1909. The defendant went into occupation of the land and paid rent to the municipality for a period of six years. On the expiry of the term of the lease, the municipality requested the defendant to vacate the land, but he insisted that the lease included a covenant for renewal which entitled him to continue in occupation. Thereupon the present suit was instituted on the 19th December, 1918. The Courts below have decreed the suit on the ground that the lease granted by the chairman was void, as such lease could have been granted only by the commissioners at a meeting.

One of the questions in controversy in the trial Court was, whether there was, in fact, a resolution of the commissioners at a meeting for the grant of this lease. The book which contains the minutes of the meetings of the commissioners was produced and no resolution could be traced therein. In these circumstances, the Courts below have inferred that there was in fact no resolution to grant the lease, adopted by the commissioners at a meeting. The concurrent decisions of the Courts below have been challenged before us on the two grounds : namely, first, that the Court of appeal below should have held that the burden lay upon the municipality to establish that the lease had been granted in contravention of the statute and that the municipality had failed to discharge this burden ; and secondly, that as rent has been received by the corporation on the basis of the lease for a term of six years, the lease has been ratified by the commissioners. In our opinion, there is no foundation for either of these contentions.

Section 34 of the Bengal Municipal Act 1884 provides that the commissioners, at a meeting may sell, let, exchange or otherwise dispose of any land not required for their purposes. Section 44 then provides that the chairman shall, for the transaction of business connected with the Act or for the purpose of making any order authorised thereby, exercise all the powers vested by the Act in the Commissioners. If this stood by itself, it might have been interpreted to cover a case within the scope of section 34. But the proviso to section 44 ordains that the chairman shall not act in opposition to or in contravention of, any order of the commissioners at a meeting or exercise any power which is directed to be exercised by the commissioners at a meeting. The grant in this case by the chairman would be void, unless the lease had been sanctioned by the commissioners at a meeting. The burden clearly lies upon

the defendant to establish that the requirements of the statute were fulfilled. He has failed to discharge that burden. In the normal course of events, the resolution adopted at a meeting of the commissioners must be recorded; and section 43 provides that minutes of the proceedings of a meeting of the commissioners shall be entered in a book to be kept for the purpose and shall be signed by the president of the meeting, and such book shall be open to the inspection of the tax-payers. Under sub-section 5 of section 78 of the Indian Evidence Act, proceedings of a municipal body in British India may be proved by a copy of such proceeding certified by the keeper thereof. The minute book has been produced, and there is no trace of a resolution on the subject. Consequently, the position is that there is no valid lease as was held in the case of *Jagannath Saha v. The Chairman of Berhampur Municipality* (1).

On behalf of the appellant, a grievance was made that a stranger in his position could not be expected to be acquainted with the nature and extent of the powers of municipal corporations. There is clearly no force in this contention. As was explained by Alderson B in *Macgregor v. Dover and Deal Railway Coy.* (2), where a corporation is constituted by a statute, all persons and corporations are presumed to know the nature and extent of its powers. It was open to the defendant, at the time when he took the lease, to make his position safe by insisting upon a copy of the resolution of the commissioners at a meeting, if such a resolution was ever adopted. It has finally been contended that as rent was paid by the defendant to the corporation for a period of six years, there was ratification by the commissioners. There is no foundation for this contention. The transaction was *ultra vires* and could not be validated by ratification in the manner suggested.

We are consequently of opinion that the decree made by the Subordinate Judge is correct and this appeal must be dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1907) 9 C. L. J. 286.

(2) (1852) 18 Q. B. 618 (631).

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CRIMINAL REVISION.

Before Mr. Justice C. C. Ghose and Mr. Justice Cuming.

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AHMED ALI SARDAR AND OTHERS

v.

KING EMPEROR*

*Bail—Sessions Judge—Reference—Criminal Procedure Code (Act V of 1898),
Secs. 118, 123(2), 498.*

The Sessions Judge has power, pending the hearing of a Reference under section 123 clause (2) of the Code of Criminal Procedure, to grant bail to a person against whom an order has been made under section 118.

The provisions of section 498 of the Code of Criminal Procedure should not be restricted.

Application for Revision under section 439 of the Code of Criminal Procedure.

Application for bail, pending hearing of Reference by the Sessions Judge under section 123 cl. (2), of the Code of Criminal Procedure.

On the 24th of April 1923, the petitioners put in an application before the learned Sessions Judge to enlarge them on bail and the Sessions Judge on that day directed the petitioners to be enlarged on bail on Rs. 250 each with two sureties of the like amount. On the next day, the following order was made by the Sessions Judge.

April, 25.

G. P. appears for the Crown and contests the above order on the ground of lack of jurisdiction. Heard also pleader for petitioners. The question turns really on the interpretation of the preventive sections as far as they concern the point of finality of the lower Court's order. It can be urged for the petitioners that as this order has to be confirmed [section 123 (2)] by the Sessions Court, it is not a final order unless or until so confirmed, and that the Sessions Court has the same powers regarding the intermediate disposal of the persons concerned as it has in cases of appeal from substantive sentences of imprisonment passed on conviction for specific offences. In both cases equally the persons are committed to jail [vide the mandatory provisions of section 123 (2)] by the lower Court. It may be argued that the lower Court's authority

* Miscellaneous Criminal Revision Case No 60 of 1923, against the order of H. C. Stork Esq, Sessions Judge of Tipperah, dated the 25th April, 1923.

thereby terminated equally in all matters connected with their intermediate disposal, that it thereupon vests in the Sessions Court, and is parallel in each case.

It is however clear now to my mind that the two cases are distinguishable. In an appeal from a substantive conviction the whole case is kept in abeyance unless or until the appeal fails. The sentence of imprisonment commences from the time the appeal is confirmed. The persons of the appellants are therefore in a sense at the disposal of the appellate Court in the meanwhile. It is not so however in a case for confirmation under section 123 (2). Supposing the case is confirmed, the order will stand not as from the date of confirmation, but as from the date it was originally passed. Moreover the case comes up before the Sessions Court at the motion of the Magistrate, not of the persons ordered to give security, who can, further, at once release themselves by executing the bonds ordered. The prosecution sections are meant to prevent crime, not to punish crime already proved to have been committed, and always connote a degree of urgency, that is to say if it has been found necessary to order any persons to execute two bonds to be of good behaviour, when the law distinctly lays down that he is to be *detained in hazat* till he executes it, or as in the present instance, till it is confirmed, the discretion as to the intermediate disposal of the persons concerned becomes at once, if anything, one executive and not a judicial discretion. I am further confirmed in this belief by the fact that under such circumstances the legislature would have made special provisions for bail had it been contemplated that the confirmatory Court had such discretionary powers—also by the fact that it is laid down in section 123 (2) that the proceedings are to be laid before the Court as soon as possible.

Being therefore satisfied that my order of yesterday was passed without jurisdiction, it is hereby cancelled. Let the lower Court be informed immediately. Let the date of hearing be altered from that already fixed to 5-5-23.

Against this order an application for revision was made.

Mohamed Nurul Huq Chowdhury for the Petitioners.

Mr. Orr. for the Crown.

The judgment of the Court as follows :

The present Rule was issued calling upon the District Magistrate of Tipperah to show cause why pending the hearing of a Reference by the Sessions Judge of Tipperah under section 123,

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clause 2, of the Code of Criminal Procedure, bail should not be granted to the petitioners to the satisfaction of the District Magistrate.

It appears that certain proceedings were taken against the petitioners under section 110 of the Code and an order against the petitioners was made under section 118. The petitioners were unable to furnish the securities demanded. The proceedings were then laid before the Sessions Judge of Tipperah for orders under section 123. The petitioners urge that pending the hearing of the Reference under section 123, Sub-section (2), they should be admitted to bail. The Sessions Judge was of opinion that having regard to the provisions of section 123, sub-section (2), he had no power to admit the petitioners to bail.

Now, the provisions of section 498 Criminal Procedure Code regarding admission to bail are particularly wide and it is pointed out in the section itself that a Court of Sessions may in any case direct any person to be admitted to bail. There are no words in section 123, sub-section (2) controlling the very wide provisions of section 498. If a person has been convicted and has appealed, he can apply for bail to the Sessions Judge. In the present case as an order has been made under section 118 against the petitioners such an order is liable in the circumstances stated to be revised by the Sessions Judge under the provisions of section 123, sub-section (2). In other words, the Sessions Judge may or may not confirm the order passed by the Magistrate under section 118 and it stands to reason that if in the case of a person who is convicted and who has preferred an appeal, bail is allowable, bail can similarly be allowed in the case of a person against whom an order has been made under section 118 and which order is liable to be revised by a Sessions Judge under the provisions of section 123, sub-section (2). At any rate, in our opinion, there is no reason why any restriction should be placed upon the wide provisions of section 498. In this view of the matter we think the Sessions Judge had power to admit the petitioners to bail and we, accordingly, send the matter back to the learned Sessions Judge in order that he may deal with the matter of the application for bail in the light of the remarks made above.

A. T. M.

Rule made absolute.

Before Mr. Justice Buckland and Mr. Justice Cuming.

RAHIM SHEIKH AND OTHERS

v.

KING-EMPEROR.*

CRIMINAL.

1923.

April, 20, 27.

Jury, discharge of—Misconduct—Inherent power—Criminal Procedure Code (Act V of 1898), sections 212, 283, 308.—Criminal Procedure Code, if exhaustive.

Where the question of misconduct on the part of the jury or other similar sufficient cause arises, the Sessions Judge has inherent power to discharge the jury and empanel another.

Per Buckland, J.: Such power to discharge the jury on such grounds is one not to be exercised lightly nor until the Judge has satisfied himself by such form of enquiry as in the circumstances he can adopt that reasonable grounds for exercising such a right exist. The matter is one for the Judge's discretion.

So far as it deals with any point specifically, the Code of Criminal Procedure is exhaustive and the law is to be ascertained by reference to its provisions.

Revision under section 435 of the Code of Criminal Procedure.

The petitioners were charged under sections 436 and 34 of the Indian Penal Code.

The material facts appear from the judgment.

Babu Bimal Chandra Das Gupta for the Petitioners.

C. A. V.

The following judgments were delivered:

Buckland, J.:—This application raises a novel point on which there does not appear to be any authority. The petitioners were put on their trial before the learned Sessions Judge of Rajshahye and a jury upon charges under sections 436 and 34 of the Indian Penal Code and the trial began on the 28th February last and continued from day to day until the 6th March. On that day when eleven witnesses for the prosecution had been examined the learned Judge recorded in the order sheet that it had come to his notice that some of the jury had been seen associating with the man looking after the case for the accused. The learned Judge appears to have held some sort of enquiry the nature of which is not specified though I will assume it was sufficient and that he was reasonably satisfied as to the conclusion at which he arrived, and thereupon stated that he had reason to believe this to be the case, and he consequently ordered the jury to be discharged and the case to be tried *de novo*.

April, 27.

* Criminal Revision No. 327 of 1923, against the order of M. H. B. Lethbridge, Esq., Sessions Judge of Rajshahi, dated the 6th March, 1923.

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Buckland, J.

These are all the facts with which we have to deal and it is now objected on behalf of the petitioners that the order discharging the jury and directing the trial to recommence *de novo* was made without jurisdiction.

The contention submitted to us is that a case such as this is not provided for by the Code of Criminal Procedure and that sections 282 and 283 are exhaustive as regards discharging a jury during the continuance of the trial; there are other sections referring to the discharge of a jury such as section 305, but those are sections which only apply at a later stage. The sections however do not profess to deal with the circumstances in which a jury may be discharged, rather it is the other way and in the circumstances to which they refer they state that that course may be pursued.

The argument submitted to us involves the proposition that whatever the stage of the trial may be, however gross the misconduct of a jury, and however patent to everybody concerned it may appear, there is no remedy but that the trial must continue to run its course to its conclusion, when, it is submitted it will be open to the presiding Judge to submit the case to the High Court under section 307 Criminal Procedure Code. So farcical a procedure would only bring the administration of justice into disrepute. In my judgment where the question of misconduct on the part of the jury or other similar sufficient cause arises the Sessions Judge has inherent power to discharge the jury and empanel another. It is true that the Code does not provide for such circumstances, but on the other hand, the presumption that jurors will discharge their duties without impropriety may explain the omission. The power to discharge a jury on such grounds is one not to be exercised lightly nor until the Judge has satisfied himself by such form of enquiry as in the circumstances he can adopt that reasonable grounds for exercising such a right exist. The learned Sessions Judge in this case has held an enquiry. With his statement as to that I am satisfied and the power being one that is not covered by any section of the Code of Criminal Procedure I think it suffices to say that the matter is one for the Judge's discretion. So far as it deals with any point specifically the Code of Criminal Procedure must be deemed to be exhaustive and the law must be ascertained by reference to its provisions, but where a case arises which obviously demands interference and it is not within those for which the Code specifically provides, it would not be reasonable to say that the Court had not the power to make such order as the ends of justice require. Holding therefore, as I do, that the jury may be discharged in circum-

stances other than those specifically provided for by the Code, section 308 cannot be held to relate exclusively to the discharge of a jury in the circumstances stated in the preceding sections. The learned Sessions Judge has in effect made an order under that section though he has not referred to it and there is therefore no reason to interfere. In my judgment this Rule must be discharged.

Cuming, J.—The facts are as follows.

Certain persons were on their trial before the Sessions Judge of Rajshahye and some 11 witnesses for the prosecution had been examined. It was then brought to the notice of the learned Judge that some of the jury had been seen associating with the man who was looking after the defence. The Court held an enquiry and being satisfied as to the truth of the allegation ordered the jury to be discharged and the accused to be tried *de novo* with a fresh jury. The present petitioner the accused has moved this Court on the ground that the Judge had no jurisdiction to discharge the jury and order a *de novo* trial. He contended that the case was not covered by either section 282 or section 283 of the Criminal Procedure Code.

No doubt the contention is correct so far that these sections do not provide for the discharge of the jury for improper conduct during the trial. In England the Judge has the power to discharge the jury if a necessity arises and whether the necessity has or has not arisen is for the Judge alone to decide and his decision is not open to review. In one case *R. v. Ward* (1) this course was followed because one of the jurors had left the box without leave. Such discharge is not equivalent to a verdict of acquittal and the prisoner can be remanded for a fresh trial: *R. v. Davison* (2). There is in this country no decided case bearing on this point. In one case tried at the High Court Sessions the jury before hearing the evidence for the defence wanted to give their verdict. Counsel for the defence pressed for their discharge on the ground of misconduct. The prosecution objected to the course. The point was not decided as the Advocate-General entered a *nolle prosequi*: *Emperor v. Olee Mahamad* (3). The learned vakil for the petitioner contended that the trial should have been allowed to proceed and then apparently that the point that some of the jury had been associating with the accused's man might be taken in appeal if necessary. The objection to such a course is obvious and in the present case

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(1) (1867) 10 Cox. 573.

(2) (1860) 8 Cox. 360.

(3) (1902) 7 C. W. N. XXXI.

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the further difficulty arises that the jury have been discharged. It however seems quite clear that unless the Judge had the power to discharge the jury in cases of misconduct great difficulties must arise and in many cases a serious miscarriage of justice and although the Code does not specifically provide for such contingency it seems clear that the Judge must have such powers.

In this view the order of the learned Sessions Judge was right and I would discharge this Rule.

A. T. M.

Rule discharged.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Rankin.

SATIS CHANDRA BISWAS AND ANOTHER

v.

NIL MADHAB SAHA AND OTHERS *

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1922.

August, 10.

Bengal Tenancy Act (VIII of 1885), Sec. 50, sub-section (2)—Presumption, when arises—Tenant, what to prove.

For a presumption to arise under section 50 sub-section (2) of the Bengal Tenancy Act, what a tenant has got to establish is not that rent has been actually paid at a uniform rate during 20 years, but that the tenant has held at a rent or rate of rent which has not been changed during 20 years. Such holding may be established even if it is not proved that rent has actually been paid during a portion of the 20 years : *Mohini v. Proo Nath* (1) followed.

In order to establish uniform payment of rent for 20 years, it is not necessary to produce rent receipts for the entire period of 20 years preceding suit. Uniform payment for the wanting years may be proved otherwise by other proof and from surrounding circumstances : *Kattiyani v. Soonduree* (2) and *Elakoo Buhsh v. Roopun* (3) referred to.

* Appeal from Appellate decree No. 219 of 1919, from a decision of R. E. Jack Esq., District Judge, Nadia, dated the 18th May 1918, affirming that of Babu Asutosh Chatterjee, Revenue Officer, Krishnagar, dated the 14th December 1916.

(1) (1922) 35 C. L. J. 309.

(2) (1865) 2 W. R. Act X rulings 60.

(3) (1867) 7 W. R. 284.

Appeal by the Defendants.

Application under section 105 Bengal Tenancy Act for assessment of fair and equitable rents.

The material facts appear from the judgment.

Babus Mahendra Nath Ray and *Baranasibasi Mookerjee* for the Appellants.

Babus Ram Chandra Majumdar, Amarendra Nath Bose and *Upendra Narain Bagchi* for the Respondents.

The judgment of the Court was delivered by

Mookerjee. J. :—This is an appeal by the tenants in a proceeding instituted by their landlords under section 105 Bengal Tenancy Act for assessment of fair and equitable rents in respect of the lands in their possession. The question in controversy is as to the status of the tenants. They were recorded as settled raiyats in the finally published record of rights. The landlords thereupon instituted the present proceedings for settlement of fair and equitable rent. The tenants contended that they were raiyats at fixed rent. In order to establish their allegation, they relied upon the presumption embodied in section 50 sub-section (2) of the Bengal Tenancy Act which provides that if it is proved in any proceeding under the Act that either a tenure-holder or raiyat and his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement. On establishment of this presumption, the raiyat becomes entitled under section 50 (1) to protection from enhancement of rent. The tenants produced rent receipts from 1885 to 1895 and from 1904 to 1911 in order to show that they held the tenancy at the uniform rent of Rs. 13-13-1 $\frac{1}{4}$ gundas. The Settlement Officer held that as no receipts were produced for the years 1896 to 1903, the tenants were not entitled to the benefit of the presumption. In his opinion, it is necessary to produce rent receipts for 20 consecutive years antecedent to the suit, to entitle the tenant to the benefit of the presumption. On appeal, the Special Judge has adopted the same view of the law. He has, however, stated in his judgment that the receipt produced for the year 1890 was suspicious and he has added that the genuineness of the receipts from 1885 to 1889 was doubtful. The reason assigned by the Special Judge for his conclusion that the receipt produced for the year 1890 was suspicious has been criticis-

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ed in this Court, and it has been pointed out that although the receipt bears on the face of it the figure "1269" instead of "1297", in writing, we find words which leave no doubt that the receipts were genuine. We are, however, not directly concerned with the reasons assigned by the Special Judge for his conclusion upon a question of fact. The fact remains that even if we accept the view that the receipt for 1890 was suspicious and that the receipts for 1885 to 1889 were of doubtful genuineness, still we have receipts from 1891 to 1895 and from 1904 to 1911. A period of 20 years intervenes between the earliest and the latest of these receipts. Consequently, the question cannot be avoided, whether it is necessary for a tenant to produce receipts for a continuous series of 20 years to entitle him to the benefit of the presumption embodied in section 50. There can be no doubt that the view taken by the Court below upon this matter is erroneous.

In the case of *Kattyani Debea v. Soonduree Debea* (1) it was laid down as follows: "It is not absolutely necessary that dakhilahs should be for 20 consecutive years before the date of suit, for it might frequently happen that parties with every right to the presumption might lose one or two dakhilahs here and there during such a long period; and it would be manifestly unjust to deprive them of the benefit allowed by law when no suspicion could arise of misfeasance, merely because one or two of these receipts had been mislaid or lost. In the present case, the missing dakhilahs are for years about the middle of the period, and we do not think that their non-appearance should defeat the special appellant's claim to the presumption." The same view was affirmed in *Elahee Buksh v. Roopun* (2) where Mr. Justice Pundit said as follows: "When receipts are filed not for the entire period of 20 years preceding suit, but some are wanting here, and some there in that interval, still uniform payment may be proved otherwise for the wanting years by other proof, and from surrounding circumstances."

This view is undoubtedly correct, upon a true interpretation of the language used by the legislature in section 50. What has to be established is, not that rent has been actually *paid* at uniform rate during 20 years, but that the tenant has *held* at a rent or rate of rent which has not been changed during 20 years. Such holding may be established, even if it is not proved that rent has actually been paid during a portion of the 20 years. This is precisely the in-

(1) (1865) 2 W. R. Act. X. Rul. 60 (60-61).

(2) (1867) 7 W. R. 284 (285).

terpretation adopted by this Court in *Mohini Kanta v. Preo Nath*(1). To return to the concrete facts of this case. Assume it to be established that rent has been paid at the rate alleged by the tenants during the years 1891 to 1895 as also during the years 1904 to 1911. It is theoretically possible that in the interval there may have been an enhancement of the rent followed by a reduction, so as to make the rent payable in 1904 identical with that paid in 1895. But, it is really for the Court of fact to decide, from all the circumstances of the case, whether the principle of continuity or the principle of discontinuity should be applied. In this connection, it must be observed that it is open to the landlord to rebut such evidence as may be produced by the tenants, by the production of counterfoils of receipts and collection papers. It is clear that the case has not been considered from the right point of view by either of the Courts below.

The result is that this appeal is allowed, the decree of the lower appellate Court set aside and the case sent back to that Court to be reconsidered. We leave it to the Special Judge to decide whether the parties should be allowed to adduce additional evidence. Costs will abide the result. We assess the hearing fee at one gold mohur.

R. M. M.

Appeal allowed : Case remanded.

(1) (1922) 35 C. L. J. 309.

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Alienation— <i>Hindu female—Dedication—Creation of permanent benefit— Religious purpose—Small portion of property.</i>	

Hindu system recognises two sets of religious acts. One is in connection with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul.

With reference to the first class of act, the powers of the Hindu female who holds the property are wider than in respect of the acts which are simply pious and, if performed, are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case she can alienate a small portion of the property for the pious or charitable purpose she may have in view.

Alienation—(Contd.)

The Hindu law recognises the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner.

A dedication of one-seventy-fifth of the property by a Hindu female for the observance of *bhog* or food offerings to God Jagannath, installed in the temple at Jagannathpuri, and for the maintenance of the priests (Pandas) who are charged with the performance of that duty, is not in excess of her powers, and is valid. *Kunwar Sardar Singh v. Kunj Behari Lal* ...

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————— *Hindu widow—Claim by purchase—Legal necessity—Recital in conveyance—Evidence—Burden of proof—Lapse of time—Enquiry—Smaller amount would have been sufficient to avert the pressure.*

When a person claims title under an alienation effected by a Hindu widow in respect of the estate of her husband, the burden lies upon him to establish either that there was legal necessity in fact which justified the alienation, or that he made proper and *bona fide* enquiries and did all that was reasonable to satisfy himself as to the existence of such necessity. In the application of this rule, it is to be borne in mind that recitals in conveyances or mortgages of the existence of legal necessity are not by themselves evidence of the fact, and there must ordinarily be some evidence *alimunde* to substantiate the allegations. Though lapse of time does not affect the question of onus of proof regarding legal necessity, it may give rise to a presumption of acquiescence or save the alienee from adverse inferences arising from the scantiness of the evidence offered on his behalf. In other words, when by efflux of time, direct evidence independent of the recital becomes unavailable, a recital of necessity, consistent with probability and the circumstances, assumes greater importance; it is clear evidence of a representation to the purchaser, and when evidence of actual enquiry by him has become impossible, the recital coupled with circumstances which justify a reasonable belief that an enquiry would have confirmed its truth, is sufficient evidence to support the transaction.

If the transaction was in the main for legal necessity, it would not be impeachable on the ground that a smaller sum might have been sufficient to remove the pressure at the time. *Chandraklaor Datta Majumdar v. Kumar Upendra Chandra Chaudhuri* ...

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Antecedent debt—Alienation by a member of a Mitakshara joint family—No necessity—Money not spent for immoral purposes—Suit by grandson during son's lifetime; See Hindu Law—Joint family ...

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Appeal—Bengal Tenancy Act (VIII of 1885), Sec. 153.—Liability to pay cess
—*Publication under the Bengal Cess Act.*

No appeal lies from the decree of the District Judge deciding the question of the liability of the defendant to pay cess when the plaintiff has not published the notice contemplated by the Bengal Cess Act. *Maharaja Birendra Kishore Manikya Bahadur v. Trilokhya Nath Roy* ...

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—*Civil Procedure Code (Act V of 1908), O. 41 R. 26—Appellate Court, decision of—Second appeal—Remand—Inherent power—Deed, fictitious—Third party, if can challenge—Title and possession, question of.*

When an order has been made under order 41 rule 25 of the Code of Civil Procedure, the appeal remains pending and undisposed of on the file of the Court and the ultimate decision when the Court is called upon to determine the appeal finally under order 41 rule 26, is to be based upon a consideration of all the findings before and after the order under Order 41 rule 25. Neither the order nor the materials placed on the record on the basis thereof can be rejected as if brought in without lawful authority.

In second appeal, the appropriate course to follow is to make not an order under Order 41 rule 25, but an order of remand in the exercise of inherent power of the Court.

A stranger to a deed can challenge it as fictitious, never designed to operate as a real deed or to effect a transfer of the title.

Questions of title and possession cannot always be properly considered piecemeal as disconnected fragments. *Kamini Kumar Deb v. Durga Cheran Nag* ...

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—*Defect of parties—One appeal against two decrees; See Res judicata* ...

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—*One appeal against two decrees—Suits tried jointly—No order for consolidation; See Res judicata* ...

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—*Order for retrial—Inherent power—Civil Procedure Code (Act V of 1908), O. 41, R. 27—Entry in record-of-rights—Presumption—Document, production of, in appellate Court—Impossibility of production in primary Court.*

An order allowing the appeal, setting aside the decree of the primary Court and directing a retrial of the suit with reference to a certain document, can be made by the appellate Court in the exercise of its inherent powers. Such an order is a decree and an appeal can be preferred against it under section 96 read with section 100 of the Code of Civil Procedure.

Order 41, rule 27 of the Code of Civil Procedure authorises the Court to afford opportunity to a party litigant to adduce additional evidence if the appellate Court requires a document to be produced or a witness to be examined to enable it to pronounce judgment or for any other substantial cause.

Appeal—(Contd.).

An order of the Settlement authorities pronounced in proceedings which are *inter parties* is not conclusive ; a presumption attaches to the order finally published under the Bengal Tenancy Act.

The record-of-rights proceedings, which were *inter parties*, were in progress during the pendency of the trial in the primary Court ; but the order for final publication had not then been made. The order for final publication was made during the pendency of the appeal :

Held, that the appellate Court could direct a retrial of the suit with reference to the entry in the record of rights and such other evidence as might be adduced by both the parties. **Bhairab Chandra Dutt v. Kall Kumar Dutt** 491

— *Order of remand passed by Special Judge—Landlord purchasing part of jote in execution of rent decree—Wrongful eviction.*

No appeal lies against an order of remand passed by the Special Judge under the provisions of the Bengal Tenancy Act.

The plaintiff landlord executed a decree for rent obtained by his predecessor-in-interest and caused seven jotes held by the tenant to be sold. The jotes were divided into two jotes. The landlord purchased the jotes in the execution sale. On the objection of the tenant, the sale as regards one of the jotes was set aside. As no objection to the sale was made as regards the other one, the sale was made absolute :

Held, that there was no wrongful eviction of the tenant at the instance of the landlord. The rent decree in execution whereof the sale followed, was binding on the tenant. **Debi Prosad Bhakat v. Official Trustee of Bengal** 314

— *Original order of Special Judge—Bengal Tenancy Act (VIII of 1885), Sec. 109 A.*

An appeal lies from an original order of a Special Judge, refusing to set aside an abatement of appeal, and section 109 A of the Bengal Tenancy Act is no bar. **Krishnadas Acharjee Chowdhury v. Samsan Ali Sheikh** 139

— *Review, granting of—Erroneous order—Civil Procedure Code (Act V of 1908), Sec. 151, O. 47 Rr. 1, 7.*

A suit was dismissed for default. As one of the plaintiffs was personally present at the time of the said order, an application for review was filed, on which the following order was passed by the Munsiff : " I set aside the order of dismissal of the suit and restore the suit in the exercise of inherent jurisdiction of this Court as section 151 of the Code of Civil Procedure gives me based on the application under order 47, rule 1 C. P. C." Against this order, an appeal was preferred by the defendants to the District Judge, who set aside the order of the Munsiff restoring the original suit :

Held, that though there might not have been sufficient reasons for entertaining an application for review, there was no appeal from that order, however erroneous it might be.

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Appeal—(Contd.).	
<i>Held also</i> , that there was no appeal to the District Judge against an order passed under section 151 of the Code of Civil Procedure. <i>Basanta Kumari Guha v. Abhoy Sankar Sen</i>	99
—, second—Civil Procedure Code, O. 41 R. 25, order under, if proper ; <i>See Appeal</i>	122
— petition treated as revision ; <i>See Revision</i>	395
Appellate Court—Inherent power—Order allowing appeal, setting aside decree of primary Court and directing retrial of suit with reference to certain document ; <i>See Appeal</i>	491
— Court, duty of—Death of one of the respondents pending second appeal—Appeal heard and case remanded—No substitution of legal representative owing to ignorance—Death became known after remand ; <i>See Jurisdiction</i>	494
Arbitrator acting without jurisdiction—Award, if and how can be questioned in a suit ; <i>See Award</i>	336
— acting without jurisdiction—Award enforced by execution under section 15 of the Arbitration Act—Suit for declaration that award is void and for consequential relief ; <i>See Award</i>	336
Assessment—Income tax—Company—Agent—Receipt of money—Indian Income Tax Act (VII of 1918), Secs. 31, 34.	
Six persons who were all residing out of British India were share-holders in the company. They were entitled to certain dividends for their shares in the company the profits of which accrued in British India. The profits due to those share-holders were sent to them by the company to their residence outside British India. The company was assessed for the super tax due on the incomes of those six share-holders as agent of the non-resident persons under the provisions of the Income Tax Act and the company had raised an objection that it could not be so assessed. The company stated in its letter to the Collector that on the declaration of a dividend the company was in the position of debtor to the share-holders :	
<i>Held, per Woodroffe and Greaves JJ. (B. B. Ghose J. contra)</i> , that the company was not, under the circumstances of the case, an agent for these persons.	
Section 34 of the Indian Income tax merely defines who may be included as an agent under section 31 of the Act and hence the agent must be in receipt of income within the terms of section 31. Sections 31 and 34 of the Act should be read together.	
<i>Per B. B. Ghose J.</i> : The agent of a non-resident person need not be in receipt of the income on behalf of such person. The mere fact of agency is sufficient to make him liable to be assessed in respect of the income of the principal. A person receiving income for another is an agent under the general law.	
Section 34 of the Indian Income Tax Act should be read in con-	

Assessment—(Contd.).

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nection with the preceding section rather than with section 31. Section 34 refers to cases where the non-resident person has no agent in British India appointed by himself and therefore it becomes necessary to find a person who should be "deemed to be an agent" only for the purpose of the Income Tax Act and that can be done by the Collector acting in accordance with the provisions of this section.

It is necessary that the person on whom the Collector has served a notice under section 34 is a "person employed by or on behalf of a person residing out of British India or having any business connection with such person," and if that condition is satisfied, the person on whom such notice has been served shall for the purposes of the income tax be deemed to be the agent of such person.

A company incorporated according to law, is an artificial legal person having an existence separate from its corporators. There is no legal impediment to a company being agent for any of its share-holders. The relation, however, of share-holder and company is not in itself the relation of principal and agent. Something more would be necessary in order to constitute a company an agent for its share-holder.

The Courts ought not to be influenced by any notion of hardship in exceptional or individual cases in interpreting a statute.

In order to prevent any case of hardship the proviso to section 34 of the Indian Income Tax Act has been enacted and the Collector may give effect to any reasonable objection before treating a person as agent under section 34. *Imperial Tobacco Company of India, Limited v. Secretary of State for India in Council* 257

Assessment, liability to—Agent of non-resident person—Such agent, if to be in receipt of income; *See* Assessment 257,

Auction-purchaser, right of—Auction sale, setting aside of—Judgment-debtor, duty of—Purchase money distributed amongst creditors of the judgment-debtor; *See* Restitution 351

—————, right of—Auction sale, setting aside of—Payment by auction-purchaser of moneys due on bonds; *See* Restitution 351

Auction sale, setting aside of, in appeal, after confirmation of sale—Order silent as regards interests on mesne profits and deposit; *See* Restitution 351

Award—Arbitrator acting without Jurisdiction—*Indian Arbitration Act (IX of 1899), Secs. 9 (b) 14,15—Award enforced by execution—Suit to declare award void—Agreement inconsistent with provisions of section 9 (b) of the Indian Arbitration Act.*

Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought to be taken by motion under section 14 of the Indian Arbitration Act, to set aside the award, but where it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose. Nor

Award—(Contd.).

is the fact that the award has been enforced by execution under section 15 a bar to a suit to have it declared void and for consequential relief. Section 15 does not enact that the award, when filed, is to be deemed to be a decree of the Court, but only that it is to be enforceable as if it were a decree.

The effect of provisions in the contract is that on a failure by either party to appoint an arbitrator which includes a failure to appoint a substituted arbitrator on the death or retirement of an arbitrator originally appointed—the appointment is to be made by the Chairman of the Association on behalf of the defaulting party, so that in every such case there are to be two arbitrators, one appointed by one of the parties, and the other by the Chairman on behalf of the other party. Both are to be men engaged in the trade, and the decision of these skilled men or their umpire is subject to an appeal to the Committee of the Association.

Held, that this agreement being inconsistent with section 9 (b) of the Indian Arbitration Act, has the effect of excluding the operation of that section. *E. D. Sassoon and Company v. Ram Dutt Ramkissen Das.* ... 336

Award—Parties and privies; *See* Award, effect of. ... 542
———, effect of.

A valid award is operative from the date of its passing and binds the parties even though neither party has sought to enforce it by a regular suit or by the summary procedure.

As between the parties and their privies, an award is entitled to that respect which is due to the judgment of a Court of last resort.

A and B made a reference to arbitration in respect of property X on the 9th September, 1916. On the 24th September, 1916, the arbitrator made his award whereby X was declared to be the property of A alone. On the 29th September, 1916, B conveyed X to C:

Held, that C acquired no title to the property X. *Baldya Nath Chatterjee v. Panchanani Dasi* ... 542

———, objection to, on the ground of misconduct or irregularity on the part of arbitrator, how to be taken; *See* Award ... 336

———, valid, when operative; *See* Award, effect of. ... 542

Ball—Sessions Judge—Reference—Criminal Procedure Code (Act V of 1898), Secs. 118, 123(2), 498.

The Sessions Judge has power, pending the hearing of a Reference under section 123 clause (2) of the Code of Criminal Procedure, to grant ball to a person against whom an order has been made under section 118.

The provisions of section 498 of the Code of Criminal Procedure should not be restricted. *Ahmed Ali Sardar v. King-Emperor* ... 592

Benamidar, suit by—Purchase by decree-holder without permission of Court—Civil Procedure Code (Act V of 1908), Sec. 66, O. 21 R. 72—Defendant in possession.

Benamidar—(Contd.).

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By an agreement between the decree-holder auction-purchaser and the judgment-debtor the latter was put in possession till a fixed time, when the decretal amount will be paid, and if not paid within that time, the purchaser will get khas possession. The amount not being paid, the plaintiff claimed khas possession:

Held, that the suit was not barred under section 66 of the Code of Civil Procedure, as the certified purchaser and his successor did not at any stage claim title under the sale certificate.

Per Walmsley, J.: That the effect of the purchase by the decree holder without the permission of the Court was voidable and not void.

Per Sahrawardy J.: That defendant being in possession of the property in suit, could urge by way of defence that the plaintiff's purchase without permission of the Court was not enforceable as against him even if it were voidable at the option of the defendant only. But it depended greatly on the discretion of the Court, and in exercising such discretion the Court would take into account prejudice to the defendant e.g. inadequacy of price etc.

Section 66 of the Civil Procedure Code applies when the plaintiff attempts to enforce his secret title as against the certified purchaser. <i>Saradindu Chakravarti v. Gosta Behari</i>	403
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Breach of peace—Order under section 145 of the Code of Criminal Procedure (Act V of 1898) in force—Fresh proceeding under section 145, if can be instituted—Land submerged—High Court's power of interference—Discretion.	
The identity of parties and lands being established, it is the duty of a Magistrate to see that the possession of the first party under the previous order passed in a proceeding under section 145 of the Code of Criminal Procedure, is not disturbed. That order is binding on the parties and the unsuccessful party cannot be allowed to disregard it and disturb the possession of the other party without having recourse to law. It is not a proper course for a Magistrate to initiate fresh proceedings under section 145 for maintaining the peace. A temporary submergence of land has not the effect of nullifying the previous order passed with regard to it.	
When legal proceedings are taken under the Code of Criminal Procedure which amount to an abuse of process of the Court and the object of which is only to harass the party who has got a previous order of the Magistrate in his favour, the High Court has jurisdiction to interfere and ought to interfere under section 107 of the Government of India Act.	
It is competent to a Magistrate to initiate such proceedings as he thinks proper and the High Court will not interfere with his discretion in starting proceedings according to its judgment. <i>Arav Sardar v. Hara Sundar Majumdar</i>	39
Burden of proof—Claiming title under alienation by Hindu widow—Husband's estate—Legal necessity—Proper and bona fide enquiries; <i>See</i> Alienation...	319
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—, Secs. 14, 556—Discretion, with whom vests—Municipality or Court of law ; <i>See</i> Calcutta Municipality	67
Calcutta Municipality—Power of Corporation to acquire surplus land—“Dharmasala,” a public purpose—Calcutta Municipal Act (III B. G. of 1899), <i>See</i> 14, 357, 556.	
A “Dharmasala” is not excluded from the term “public purpose.” Under the Calcutta Municipal Act, the Corporation of Calcutta has power to acquire surplus lands in any area for the purpose of erecting a “Dharmasala” for the use and convenience of pilgrims crowding to a Hindu temple within the area.	
Under sections 14 and 556 of the Calcutta Municipal Act, the discretion is vested in the Municipality and not with a Court of law. <i>Amulya Chandra Banerjee v. Corporation of Calcutta</i>	67
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Committing Magistrate, duty of—Reference—Minor charge—Acceptance of jury's verdict as to graver charges—Charge under section 332 of the Indian Penal Code (Act XLV of 1860.)	
When a prosecution is started before a Magistrate on charges exclusively triable by a Court of Session, and there is some evidence to support such charges, it is not obligatory on the Magistrate to commit the accused to the Court of sessions in all cases. He should exercise his discretion and see the facts in true proportion and decide whether or not he should try the case himself.	
It is not always true that a Judge having accepted the jury's findings on graver charges, cannot make a reference with the object of having some of the accused convicted on a minor charge under section 332 of the Indian Penal Code. <i>King-Emperor v. Haridas Mitra</i>	34
Company, if can be agent for any of its share-holders; <i>See</i> Assessment	257

Company and share-holder, relation between—Principal and agent ; <i>See</i> Assessment	257
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Compromise— <i>Criminal Procedure Code (Act V of 1898), Sec. 345—Charge under sections 323 and 342 I. P. C. (Act XLV of 1860),—One of the complainants not a party.</i>	
The opposite party were charged under sections 323 and 342 I. P. C. In the first charge they were alleged to have caused hurt to A and in the second charge they were alleged to have wrongfully confined A and the petitioner. They were convicted on both these charges ; they appealed. At the hearing of the appeal an application was made by A to compound the case under section 345 of the Code of Criminal Procedure. The Magistrate allowed the compromise and acquitted all the appellants in the appeal under that section:	
<i>Held</i> , on the application of the petitioner, that as he was no party to the compromise, the order of acquittal so far as the offence committed against him was concerned, was illegal. <i>Shib Chandra Chakravarty v. Rabbani Mandal</i>	254
— <i>Rent—Bengal Tenancy Act (VIII of 1885), Sec. 109 C.—Fair and equitable rent—Contract contravening provisions of the Act.</i>	
In every case, where the provisions of section 109 C of the Bengal Tenancy Act are invoked, there should be a strict compliance with its requirements.	
Under section 109 C of the Bengal Tenancy Act, the Settlement Officer has to determine, in the first place, whether the terms of the agreement are really such that if they were embodied in a contract, they would not be enforced under the Act. If the conclusion is in the affirmative, he is to satisfy himself that the rent agreed upon is fair and equitable. It is only in the event of his being so satisfied, but not otherwise, that he can settle such rent as fair and equitable rent.	
Where the order of the Revenue officer was : "The tenant agrees. Though the increase is rather large, the attested compromised rent may be settled as fair and equitable" :	
<i>Held</i> , that section 109 C of the Bengal Tenancy Act did not contemplate settlement of fair and equitable rent on the basis of such an ambiguous order, and in accordance with a contract, which contravened the provisions of the Bengal Tenancy Act. <i>Moydhannessa Bibi v. Satish Chandra Gird</i>	118
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Contempt of Court— <i>Criminal Procedure Code (Act V of 1898), Sec. 481—</i> <i>'If any.'</i>	
In a prosecution for contempt of Court against a legal practitioner, he was not called upon to make a statement and no statement was recorded : <i>Held</i> , that this defect in the procedure was fatal.	
No person can be punished for contempt of Court which is a criminal offence unless the specific offence charged against him be distinctly stated, and an opportunity given him of answering :	
The expression 'if any' in section 481 of the Code of Criminal Procedure indicates that the Court cannot compel the accused to make a statement, but it does not mean that it should not give him an opportunity to make a statement. <i>Krishna Chandra Bhowmik v. Emperor</i>	535
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Criminal intimidation— <i>Penal Code (Act XLV of 1860), Sec. 503—Threat to property—Effect on person threatened.</i>	
<i>Per Newbould and Buckland JJ. (Sukrawardy J. Contra)</i> —A notice signed by the petitioner and issued under his authority as President of the <i>Salisi Nispathi Mundali</i> was served on the complainant. In this notice it was stated that a certain person filed a claim for certain amount against the complainant who was informed that he should appear before the Court and settle the claim. The notice concluded thus : " If the defendant do not answer the claim on the date fixed the claim will be decreed <i>ex parte</i> on the evidence of the plaintiff. No objections will be entertained after the passing of such an <i>ex parte</i> decree."	
<i>Held</i> , that the petitioner threatened the complainant with harm to be caused illegally and hence committed the offence of criminal intimidation.	
Under section 503 of the Indian Penal Code, the capacity of the person making the threat to carry it into execution is not needed.	
<i>Per Sukrawardy J.</i> The elements constituting the offence of criminal intimidation under section 503 of the Indian Penal Code are, <i>first</i> , threat of injury to the property of the complainant, and, <i>secondly</i> , the intention to cause alarm. The threat must be a direct threat to cause harm to a person in property and not by way of the insinuation of possibility or even probability of such harm.	
The mental condition of the complainant does not determine the offence of criminal intimidation. It is the mental attitude of the accused or <i>mens rea</i> that ordinarily makes an act criminal.	
<i>Per Buckland J.</i> Section 503 does not say anything about the effect upon the person threatened. <i>Priya Nath Gupta v. Lajli</i> ...	526
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—, Sec. 145—Magistrate, if can question the validity of a civil Court decree ; <i>See</i> Possession	236
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—, Secs. 145, 350 proviso (a)—Magistrate, if can base his decision on evidence recorded by another Magistrate ; <i>See</i> Jurisdiction	128
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—, Sec. 403.—Acquittal on a charge under section 426 I. P. C.—Prosecution under section 379 I. P. C., on the same facts, if can be had ; <i>See</i> Acquittal	253
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—, Sec. 423—Order of acquittal of offence under Sec. 379 I. P. C.—Sessions Judge upholding conviction and sentence under Sec. 143 I. P. C. ; <i>See</i> Conviction, altering	409

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Criminal Procedure Code, Sec. 481—'If any'—Opportunity to make a statement; <i>See</i> Contempt of Court	533
—————, Sec. 488—Agreement—Arrears of maintenance—Intention; <i>See</i> Maintenance	180
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Declaratory decree— <i>Recognition of different rights—Long lapse of time—Effect.</i>	
In a settlement made in 1867 the right of the respondents was recorded as that of <i>thehadar</i> without having either proprietary or under-proprietary rights in mouza Kusehti in the appellant's estate of Surajpur.	
In 1868 a decree was passed between the parties to the same effect. In spite of the declaratory decree, the respondents claimed <i>pukhtadari</i> or under-proprietary right in some proceedings in 1887 to which the appellant's predecessor was a party and the claim was allowed. Again when the original settlement ended about 1897, a new settlement was made on the footing that the respondents' predecessors were under-proprietors. Further the Court of Wards, on behalf of the then taluqdar, sued the respondents for rent as <i>pukhtadars</i> :	
<i>Held</i> , that, in spite of the decree of 1868, a title so long recognised cannot be defeated. <i>Pirthipal Singh v. Ganesh Dia Singh</i>	219
Decree—Order setting aside decree of primary Court and directing retrial of suit with reference to a document; <i>See</i> Appeal	491
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Dedication by Hindu widow—Creation of permanent benefit—Religious purpose—Small portion of property ; <i>See</i> Alienation	383
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When a person is induced to execute a document other than what he had undertaken to execute, the document is void and need not be cancelled.	
The plaintiff's asking for consequential relief in a declaratory suit, depends upon the circumstances of each case.	
Where the plaintiff alleges that she is still in possession of the property but all that she requires at the time of suit is a declaration that the deed which is in the hands of the defendant is not her deed, the Court-fee payable on the plaint is rupees ten. <i>Umaranessa Bibi v. Jamuranessa Bibi</i>	499
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— from Zemindar, if demand on Zemindari ; <i>See</i> Putni lease	556
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—, presentation of, for registration—Rules ; <i>See</i> Registration	377
—, production of, in appellate Court—Impossibility of production in primary Court ; <i>See</i> Appeal	491
Ejectment—Bengal Tenancy Act (VIII of 1885), section 182—Part of homestead used for keeping agricultural cattle.	
A part of homestead used by a settled raiyat for keeping agricultural cattle is governed by section 182 of the Bengal Tenancy Act.	
A homestead land is used for agricultural purposes, if a raiyat keeps agricultural cattle on a part of it. <i>Girja Chandra Bhattacharyya v. Bhabataran Shakari</i>	524
— Lease unauthorised by Chairman of Municipality—Lease containing renewal clause—Lease remaining in possession for the period contained in the lease—Holding over ; <i>See</i> Lease	589
— Permanent tenancy—Long possession and uniform payment of rent—Transfer of Property Act (IV of 1882), Sec. 106—' Or '—Notice ; service of—Service on head member of joint family.	
More long possession and uniform payment of rent are not by themselves sufficient to make a tenant a permanent one. The material elements are— —the land had been let out for purposes of residence, that it had been so	

Ejectment—(Contd.).

occupied, that there had been instances of transfer and succession, and that structures were erected on the land.

The land was in occupation of two sets of tenants and notice to quit under section 106 of the Transfer of Property Act was served on the respective heads of two joint families :

Held, that the service was sufficient, notwithstanding that there was no proof of prior tender or delivery to each of the joint tenants personally.

The word 'or' is an alternative word. It is not always disjunctive, and is, sometimes interpretative or expository of the preceding word.

In section 106 of the Transfer of Property Act, the legislature uses the expression "If such tender or delivery is not practicable" in one contingency, namely, when service is effected by fixing the notice to a conspicuous part of the property. *Kedar Nath v Madhu Sudan* ...

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Ejectment—Purchaser of non-transferable occupancy holding—Presumption—Rent payable in kind—Bengal Tenancy Act (VIII of 1885), Sec. 50, applicability of—Analogy—Evidence de hors, admissibility of—Intention of writer—Demand for rent, if constitutes relationship of landlord and tenant.

Section 50 (2) of the Bengal Tenancy Act is limited in its application to suits or proceedings under the Act. But even though the section is not applicable to a suit for ejectment: the Court may act on a presumption similar to one arising under the section, if the facts justify the necessary inference.

The presumption mentioned in section 50 of the Bengal Tenancy Act applies whether the rent is payable entirely in cash or partly in cash and partly in kind or entirely in kind. The same principle applies to suits or proceedings where the rule embodied in section 50 is extended by analogy.

Outside evidence is not admissible to show the intention of the writer, which is not disclosed by the authorised channel, namely, the words which he himself selected.

Where the defendant purchased holdings on the assumption that they were transferable and he professed to be tenant in occupation, demand by the plaintiff for rent is good evidence of mutual consent to the creation of a tenancy, unless the plaintiff is able to explain that the demand was not unqualified and should be differently interpreted. *Manmatha Nath Kar v. Probodh Chandra Ratarhi* ...

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—Raiyat, status of—Lease, condition in, entitling landlord to realise rent by summary process—Bengal Tenancy Act (VIII of 1885), Sec. 49 (b)—Notice, form of—Waiver—Receipt of rent due prior to forfeiture.

The status of a raiyat is not elevated by a condition in a lease entitling the landlord to realise rent by summary process.

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Ejectment—(Contd.)	
The technicalities of the English law relating to the form and contents of a notice to quit should not be introduced in connection with the provisions of section 49 of the Bengal Tenancy Act.	
There is sufficient compliance with the requirements of section 49 of the Bengal Tenancy Act, if what is served upon the tenant gives him notice to quit the land at the end of the agricultural year next following and the suit is instituted after the lapse thereof.	
Where the notice to an under-raiyat was described as a notice under section 49 of the Bengal Tenancy Act and there was no specification of the date when the tenant was required to vacate the land, but the suit was instituted long after the expiry of the agricultural year following that in which the notice was served :	
<i>Held</i> , that the requirements of section 49 (b) of the Bengal Tenancy Act were fulfilled.	
Receipt of rent due prior to forfeiture, subsequent to the service of notice to quit under section 49 (b) of the Bengal Tenancy Act, is not a waiver of the right of the landlord to eject. <i>Purna Chandra Das v. Ali Mahammad</i>	549
Election—Bequest to wife for life—Executor giving the property to use ; See Maintenance	20
Embankment—Bengal Embankment Act (II B. C. of 1882), Sec. 68—Erroneous order—No specification of instalments—Jurisdiction.	
There was an order under the Bengal Embankment Act for apportionment made by the Collector as between the proprietors on the one hand and the tenure-holders on the other. This order was made after due service of notices on the tenure-holders. The order did not specify the instalments and the dates on which the sum included in each instalment was to be made payable. The final order was served upon the tenure-holders and no objection was taken to it. The proprietors paid the amount due to the Collector in one instalment in accordance with that order. They then instituted the present suit for recovery of the amount from the tenure-holders. The tenure-holders objected that they were not liable to pay the entire amount in one instalment. The Courts below made a decree in favour of the plaintiffs, only in respect of such sums as would have been payable by the tenure-holders if an order for payment by instalments had been correctly made by the Collector :	
<i>Held</i> , that it was not open to the Courts below to adopt this method of granting relief to the plaintiffs and that the plaintiffs were entitled to a decree for the amount claimed by them.	
That the order of the Collector, though erroneous, was made in the exercise of jurisdiction.	
That it was not open either to the plaintiffs or the defendants to ignore the order which was made by the Collector. <i>Hon'ble Kumar Arun Chandra Singha Bahadur v. Monmohan Saha Roy</i>	585

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Estoppel—Security for costs deposited under compromise decree—Suit challenging validity of compromise; <i>See</i> Pardanashin lady	501
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———, Sec. 114 (c)—Warrant of attachment of movable property signed by Sheristadar 'by order'; <i>See</i> Presumption	331
Exclusion, instances of, when of value; <i>See</i> Hindu law	233
Execution sale— <i>Fraud—Purchaser, title of—Purchaser for value and without notice, plea of, if can be taken in second appeal—Decree obtained by fraud—Sale, if invalid—Justice, equity and good conscience, applicability of.</i>	
<i>Per Mookerjee, J:</i> The plea of defence of purchase for value without notice is allowed to be raised in second appeal, though not specifically raised in the pleadings or in the issues, when it has been pleaded in substance and is a just inference from the facts alleged. The defect may be remedied by a remand on terms as to costs.	
<i>Per Rankin, J:</i> From the circumstances of the case the defence of purchaser for value without notice has no basis in the facts.	
The fact that the Court has been successfully deceived is one which, upon the issue as to the purchaser's good faith, is of very different value in different circumstances.	
Judicial sales fraudulently procured will not give a good title to a purchaser who does not take in good faith and without notice.	
The burden is on the purchaser to prove that he acted in good faith and without notice of fraud.	
The rule is not that there is a special favour for every one until he is shown	

Execution sale—(Contd.).

to have been dishonest or a volunteer, but that equity where it can will favour those who show that in innocence they have given value.

Per Mookerjee, J. : The protection given to the *bona fide* purchaser had its origin exclusively in equity and is based entirely upon the conception that a Court of equity acts solely upon the conscience of litigant parties, by compelling the defendant to do what, and only what, *in foro consciential*, he is bound to do. If the relations between the two contestants standing before the Court are such that, in equity and good conscience, the plaintiff ought to obtain the aid which he asks, and the defendant ought to do or suffer what is demanded of him, then the Court will interfere and grant the relief; if the relations are not of this character, then the Court will withhold its hand and will leave the parties where they stand. The protection given to the *bona fide* purchaser, therefore, simply means that from the relations subsisting between the two parties, specially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so; the Court will not, in such an event, aid either party against the other. The doctrine of *bona fide* purchase is thus not a rule of property. It does not determine the question of title between parties. It is in most cases available only by way of defence. It is a shield in the hands of a defendant, to protect him against the claim of his adversary. It means that equity will refuse to interfere to aid the plaintiff in his suit, because, under the circumstances of the case, it would be unconscionable that the plaintiff should have what he seeks to obtain. It enforces no right, but simply refuses to interfere in the plaintiff's behalf.

In all cases for which no specific statutory directions are given, Judges should act according to justice, equity and good conscience.

The decision of a case according to the principles of justice, equity and good conscience has generally meant decision according to the principles of English law applicable to a similar state of circumstances in this country.

An execution sale, which has been brought about by fraud of the decree-holder, is liable to be set aside on that ground, by application to the execution-Court, even though it is not established that the auction-purchaser, a stranger, has participated in or has been cognisant of the fraud.

Subject to the conditions prescribed by order 21 rule 90 of the Code of Civil Procedure, an execution sale may be set aside on the ground of fraud precisely in the same manner as on the ground of irregularity, and that the exercise of this power by the Court is not excluded in cases where the purchaser falls within the category of *bona fide* purchaser for value without notice.

The rule that a stranger purchaser is not affected by the reversal of the decree for error or irregularity, is based on grounds of public policy.

Bhreeswar Ghose v. Panchouri Ghose ...

Execution sale, nature of—Bengal Tenancy Act (VIII of 1885), Sec. 158B sub-section (2)—Omission to serve notice on Co-sharer landlord—Co-sharer not objecting but withdrawing money—Contravening provisions of statute, effect of—Irregularity and nullity.

Where a co-sharer landlord being satisfied with the regularity of the execution proceedings, withdrew the money which was in Court in satisfaction of his dues, an omission to serve upon the co-sharer landlord the notice contemplated by sub-section 2 of section 158B of the Bengal Tenancy Act, did not nullify the sale or alter its character to that of a sale held in execution of a money decree.

It is open to a co-sharer landlord to waive the benefit of sub-section 2 of section 158 B of the Bengal Tenancy Act.

When the provisions of a statute have been contravened, if a question arises as to how far the proceedings are affected by such contravention, the matter should be determined with regard to the nature, scope and object of the particular provision which has been violated.

No hard and fast line can be drawn between a *nullity* and an *irregularity*. An irregularity is a deviation from a rule of law, which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever or is void and incapable of being validated. One useful test to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can, it amounts to an irregularity, if not it is a nullity.

If the provision of a statute has been enacted on grounds of public policy, an individual cannot waive it; but if it has been enacted for the benefit of an individual, he can waive it. *Rajani Kanta Ghose v. Sheikh Rahaman Gazi* 447

Execution sale brought about by fraud of decree-holder, effect of—Auction-purchaser, a stranger, not a party to fraud; See Execution sale ... 145

Executors, decree against—Shebait—Unborn person; See Trustee ... 469

Family settlement based on invalid wakf but in compromise of a disputed claim, validity of; See Wakf 56

— usage, developed into binding law, if can be superseded; See Hindu law 233

Gift — Handing over property by donor and acceptance of donee, a good evidence; See Mahomedan law—Sunnis 1

— — Reservation of usufruct by donor; See Mahomedan law—Sunnis ... 1

Gift, valid, under Mahomedan Law—Conditions; See Mahomedan Law—Sunnis 1

— of entire taluqdari estate—Possession of part by donee—Constructive possession of other part to be implied; See Mahomedan Law—Sunnis ... 1

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Government of India Act, Sec. 107—Legal proceedings taken under Criminal Procedure Code, amounting to abuse of process of Court—Proceedings taken to harass the party; <i>See</i> Breach of peace	39
Grant, whether restricted to a right of fishery or included a sheet of water together with sub-soil; <i>See</i> Second appeal	580
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High Court, duty of, to pronounce opinion on all important issues; <i>See</i> Revenue, arrears of	561
————, If can interfere—Magistrate initiating proceedings according to his discretion; <i>See</i> Breach of peace	39
————, power of — <i>Definite findings of fact—Land tenure in Madras—Inam grant—Absence of presumption—Occupancy right—Legislation pendente lite—Estates Land Act (I of 1908)—Appellate Court, powers of—Code of Civil Procedure (Act V of 1908) sections 100, 103, O. 41 R. 25.</i>	

A grant of a village in 1743 to the Mutt did not expressly grant both the Melwaram and Kudivaram rights to the grantees. The appellant sued to eject the tenants respondents from their holdings. The trial Court held on the evidence that the tenants had established their occupancy right in their holdings by their dealings with such right for over a century. The District Court on appeal affirmed this view of the trial Court but directed ejectment in some cases on the basis of muchilkas filed by the appellant. Both parties preferred second appeals to the High Court from the decrees against them. Meanwhile the Estates Land Act was passed. The High Court, in view of the provisions of section 6 of the Act, directed the District Judge to submit a finding on the question whether the grant to the appellant was of the land revenue or of the Kudivaram also. The District Judge found that the grant was only of the land revenue, but the finding was based merely on the construction of the grant and on certain presumptions and not upon the evidence in the case. The High Court was of opinion that this finding was neither satisfactory nor sufficient. The matter was sent back to the District Judge who failed to come to any definite conclusion on the question. The High Court sent it to the District Court a third time for a definite finding on the evidence on record.

The District Judge returned findings confirming the findings of the trial Court. The High Court accepted the findings and dismissed the suits:

Held, (1) that the High Court had power to call for definite findings on facts from the lower appellate Court; (2) that there is no question of onus or presumption where the rights of the parties are to be determined on the evidence on record; and (3) that the tenants had established their occupancy right by proper evidence.

High Court—(Contd.).

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- No opinion was expressed as to whether Act I of 1908 applied to rights in litigation at the time of the passing of the Act. *Chidambara Sivaprakasa Pandara Sannadhigal v. Veeramareddi* ... 199
- Hindu, member of, if can disclaim his personal law and adopt another at his choice; *See* Hindu law ... 233
- Hindus converted to Islam—Hindu law, retention of; *See* Mahomedan law ... 231
- Hindu family, governing law, of what furnishes; *See* Hindu law ... 233
- family, if can modify its own governing rules; *See* Hindu law ... 233
- Hindu joint family—*Madras Presidency—Business contract—Liability of members taking benefit.*
- Two members of a Hindu joint family in the Madras Presidency, consisting of three adults and a minor, executed a letter to the respondents' firm and borrowed money for the purpose of starting and carrying on a brewery business. The other adult member acted as unpaid agent of the business at Madras and otherwise accepted the benefit of the contract. None of them possessed any property other than the joint family property in which the minor is also interested:
- Held*, that the members of the joint family who were parties to the contract or accepted it as such, cannot escape their liability to perform it or pay damages for the non-performance of it on the ground that they have no property other than the joint family property; and it is unnecessary to consider the position in other provinces under similar circumstances.
- P. M. Sadasiva Mudaliar v. A. R. Hjee Fakcer Mahamed Sait* ... 569
- Hindu law—*Aboriginal Bhuiyas—"Chowrasi" gadis—Succession—Adoption—Special custom—Property situated in Santhal Parganas—Bhagalpur Court—Jurisdiction—Regulation III of 1872—Impartible estate.*
- The holders of "Chowrasi gadis," of which Lachmipur Raj is one, claim to be Surjabansi Rajputs and as such high caste Hindus. They are really descendants of aboriginal Bhuiyas who had become Hindus long ago. On the question whether an adopted son succeeds to the gadi, either by law or custom:
- Held*, that this clan of Chowrasi gadis had adopted in general not only Hindu religion and Hindu social usages, but also the Hindu law regulating succession to landed property, though they still retain some relics of non-Hinduism.
- Held*, also on the evidence that the custom of excluding adopted sons from succession was not established.
- An estate only becomes impartible by custom, and the custom has in each case to be proved.
- Custom of impartibility and succession of nearest of kin discussed and distinguished.
- Decision on the question whether, under Regulation III of 1872 relating to Santhal Parganas, Bhagalpur had jurisdiction to try the suit, part of

Hindu Law—(Contd.).

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subject matter being situate in Sonthal Parganas considered unnecessary.

Sahdeo Narain Deo v. Kusum Kumari 369

—*Gift—Gift to daughter out of joint property—Suit for partition*

—*Status of family—Provision for marriage expenses.*

The institution of a suit for partition by a member of a joint Hindu family puts an end to its joint status.

No provision for the marriage expenses of the members of the family can be made in the decree in a partition suit, even though such marriages take place after the institution of the suit and before the decree is passed.

Gifts to daughters by a member of a joint Hindu family out of joint property are not invalid, if they are found to be reasonable in the circumstances of the case. *K. Ramalinga Annai v. Narayana Annai* ...

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—*Joint family in Berar—Claim of share by one member—Agreement appointing an arbitrator to partition—Severance of status—Alienation—Right of purchaser of undivided share—Agreement not set up—Plea, if can be subsequently raised.*

The Mitakshara is to be interpreted in Berar in the same manner as in Bombay. A member of a joint family in Berar can alienate his undivided share without the consent of his co-sharer.

In the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place; and the commencement of a suit for partition is sufficient to effect a severance in interest even before decree.

Where a member of a joint Hindu family claims a partition and the members sign an agreement appointing an arbitrator to divide the properties, the claim and the agreement effect a severance of the joint family status.

Although agreement effecting severance of the joint family was not pleaded and the defendant pleaded that the vendor was separate in estate:

Held, that the agreement leading up to the division could not be put out of account. As the subsequent division of the property between the co-owners was accepted by all parties and was not said to be unfair, the sale to the appellant could not be set aside at the instance of the joint owners, but only (if at all) at that of the vendor or his representatives.

Syed Kasam v. Jorawar Singh 73

—*Joint family—Dayabhaga school—Business and ancestral property—Bequest of movables and shares of joint business by one member—Movables and immovables acquired out of the income and profits of joint business—Joint property income mixed up the business accounts;*

See Presumption 515

—*Joint family—Mitakshara—Alienation by a member—Usu-*

Hindu law—(Contd.).

fructuary mortgage and subsequent sale to mortgagee—Antecedent debt—Pious obligation to pay grandfather's debts.

A member of a joint Hindu (Mitakshara) family executed a usufructuary mortgage and three years later sold the equity of redemption to the mortgagee. No necessity for either transaction was made out nor was it proved that the money was spent for immoral purposes. After his death, but during the life of his sons, the grandsons sued to recover the property from the vendee :

Held, that there was no antecedent debt to justify either the mortgage or the subsequent sale, that the alienation is not binding on the plaintiffs and that they are under no pious obligation to pay the vendee the money that their grandfather received. *Chet Ram v. Ram Singh*

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Migration of family—Presumption—Family usage developed into binding law, if and how can be changed—Partition—Test—Taluk property, donees of, if joint tenants—Judgment, if relevant—Evidence Act (I of 1872), Sec. 11—Evidence elucidating history and status of family.

A Hindu family, residing in a particular province of India, is presumed to be governed by the law of the place where it resides. This presumption is rebutted, where the family is shown to have migrated from one province to another ; the presumption then arises that the family carried with it the laws and customs as to succession and family relation prevailing in the province from which it came. After the rebuttal of the presumption, the burden shifts and the other side has to prove that the family, after migrations has adopted the law and usage, of the place to which it has migrated.

Hindu law is not merely a local law, but is essentially personal law, an integral fact or of the status of every family which is governed by it. In its new domicile, the family may, by the reflex action of manners and customs prevalent in resident families, consciously or unconsciously, modify its own governing rules ; there may thus be an acceptance of a new law, not due to sudden change by choice or agreement, but by the gradual evolution of a family usage. When a new family usage has thus grown up in the course of generations, possibly with the concurrence or acquiescence of families of the same group, it furnishes the governing law of the family. Where a family usage has thus developed into a binding law, it may be superseded, by the growth of a contrary usage or by legislative enactment. It is not open to a member at any time to disclaim his personal law and adopt another at his choice.

Instances of exclusion are of value, only if there is proof of demand and refusal.

The true test of partition of property is the intention of the members of the family to become separate owners. Consequently, there may be partition, even though there be no actual division by metes and bounds.

Hindu Law—(Contd.).

Property given by grandfather to his grandsons as *Yatuk* or affectionate gift, does not make the donees joint tenants with right of survivorship.

Though the recitals in the judgment cannot be used as evidence, still the judgment is evidence as a relevant fact in issue or as a transaction.

Evidence adduced to elucidate the history and status of what has been called connected families, where a family is one of a group, may be admitted under section 11 of the Evidence Act. *Sarada Prasanna Roy v. Uma Kanta Hazari* 233

Mitakshara—Inheritance—Sudras in Madras—Illegitimate son—Share.

Under the Mitakshara law in Madras, the illegitimate son of a Sudra inherits one-half of the share to which he would have been entitled had he been legitimate.

In a competition between the legally married widow and the sole illegitimate son, the latter would take a half-share of the inheritance and so he and the widow take equal shares. *Kamulammal v. T. B. K. Vis. vanathaswami Naicker* 363

..., nature of; *See* Hindu law 233

Hindu widow—Alienation—Necessity—Compromise.

The word 'necessity'; when used in connection with alienation by a Hindu widow, has a somewhat special, almost technical, meaning. A widow can alienate if there are no other means available for the obligatory ceremonies to secure the repose of the soul of her husband. A holder of a Hindu woman's estate can in some circumstances alienate immovable property to pay the last owner's debts, or (if there is no other available source of supply), for her own or infant children's maintenance. Necessity does not mean actual compulsion, but the kind of pressure which the law recognises as serious and sufficient.

A compromise made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner, will bind the reversioner quite as much as a decree on contest. *Ramsurran Prasad v. Shyam Kumari* 356

Homestead Land, when used for agricultural purposes; *See* Ejectment ... 324

Hostile witness—Witness, prosecution, telling different story in Sessions Court from that recorded by Sub-Inspector after occurrence; *See* Witness ... 173

Hostile witness, evidence of, if can be believed in part; *See* Witness ... 173

Illegality—Criminal Procedure Code (Act V of 1898), Secs. 342, 537—Compliance with law—Examination of prosecution witnesses after statement of accused taken.

The trial Court after recording the deposition of two witnesses for the prosecution recorded the statements of the accused. Later four witnesses for the prosecution were examined and charge framed. After that further statements of the accused were recorded:

Held, that the omission to comply with the requirements of section 342 of

ILLEGALITYS—(Contd.). PAGE.

the Code of Criminal Procedure was an irregularity which could not be cured by section 537. All the proceedings after the statement of the accused had been recorded were vitiated in law.

The provisions of the Code of Criminal Procedure are to be strictly observed.

Where the terms of the Code of Criminal Procedure are perfectly clear, they would not be deliberately disregarded. *Hamid Ali v. Sriklissen Gossain* 413

Impartible, estate when becomes ; *See* Hindu Law 369

Impartible estate—*Partition—Intention—Accretion—Produce of impartible estate—Joint family.*

It is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever, and this is also true with regard to an impartible estate. Clear and strong evidence is necessary to establish such separation.

The produce of an impartible estate does not necessarily belong to and form an accretion to the original property. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely disassociated from the ownership of the Raj. Nor could the monies have been used by him for the purpose of acquiring or endowing an impartible estate.

In the case of an ordinary joint family estate, the income, equally with the corpus forms part of the family property, and if the owner of the estate mixes his own monies with the monies of the family property, his own earnings share with the property with which they are mingled the character of joint family property ; but no such considerations necessarily apply to the income from impartible property. *Rani Jagadamba Kumari v. Thakur Wazir Narain Singh* 287

Impartible estate, produce of, if an accretion ; *See* Impartible estate ... 287

——— estate, severance of ; *See* Impartible estate ... 287

Inam grant—Absence of presumption—Occupancy right ; *See* High Court ; power of 199

Income received from impartible estate, to whom belongs ; *See* Impartible estate 287

——— from ordinary joint family estate and from impartible estate ; *See* Impartible estate 287

Indian Arbitration Act, Sec. 9 (b), agreement inconsistent with, effect of ; *See* Award 336

——— Sec. 14—Objection to award on the ground of misconduct or irregularity on the part of arbitrator ; *See* Award ... 336

Indian Income Tax Act, Sec. 31, 34—Agent ; *See* Assessment ... 257

——— —, Sec. 34, if to be read with section 31 ; *See* Assessment ... 257

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Inherent jurisdiction—Court to act rightly and fairly towards parties ; <i>See</i> Restitution	351
Inherent jurisdiction—Duty of Court to “place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed” ; <i>See</i> Restitution...	351
———— power—Appellate Court—Order setting aside decree of primary Court and directing retrial of suit with reference to certain document ; <i>See</i> Appeal	491
———— power—Sessions Judge’s power to discharge jury for misconduct ; <i>See</i> Jury, discharge of	595
Inheritance—Illegitimate son of Sudra—Mitakshara law in Madras ; <i>See</i> Hindu Law	363
Interest—Bengal Tenancy Act (VIII of 1885), Sec. 67—High rate of interest—Kabullat executed before the passing of the Act.—Holding purchased in execution of rent sale.	
Section 67 of the Bengal Tenancy Act is applicable to the case of arrears of rent of a holding purchased in execution of a rent decree for arrears of rent accrued after the coming into force of the Act, of the holding of the tenant, who entered under a kabullat executed before the passing of the Act, which stipulated interest at the rate of 75 per cent per annum on arrears of rent. <i>Annadamoyi Debi v. Saudamini Debya</i>	333
———— Contract made before the passing of the Bengal Tenancy Act, to pay rent in monthly instalments—Bengal Tenancy Act, Secs. 53, 67 ; <i>See</i> Rent	222
———— Mesne profits—Deposit of purchase money—Auction sale, setting aside of, on appeal ; <i>See</i> Restitution	351
————, calculation of—Contract made before the passing of the Bengal Tenancy Act, to pay rent in monthly instalments—Bengal Tenancy Act, Secs. 53, 67 ; <i>See</i> Rent	222
Interest at high rate—Small Cause Court Judge, power of ; <i>See</i> Jurisdiction	399
Invalid wakf, agreement based on—Compromise of a pending litigation—Allowances to living and named persons to be continued to their heirs ; <i>See</i> Wakf	56
Irregularity, gross—Failure of justice—Magistrate disregarded delivery of possession ; <i>See</i> Possession	256
Jalkar, meaning of ; <i>See</i> Second appeal	580
Joint family—Lease by manager—Lease, a collateral security—Debt improvidently contracted—Lease, construction of.	

A lease, which is in effect a collateral security for the mortgage debt, by which an infant co-sharer’s property is put into pledge to secure the repayment of moneys in respect of debts improvidently contracted by his father and manager, is not fair and reasonable and in proper exercise of a manager’s power.

A lease must be regarded as a whole. A provision for payment of interest

Joint family—(Contd.).

and any other objectionable provision in it cannot be regarded as independent bargain between the lessee and the lessor which can be cut and separated from the general structure of the lease to relieve the infant's property from these offensive provisions. <i>Narsin Das v. Abinash Chander</i>	457
— family, how severed; <i>See</i> Impartible estate	287
— family, how severed— <i>Mitakshara</i> school—Suit for partition; <i>See</i> Hindu Law—Joint family	73
— family, if severed—Member claiming partition and agreeing to appoint arbitrator to divide properties; <i>See</i> Hindu Law—Joint family ...	73
— family, member of, in Berar, if can alienate his undivided share without the consent of his co-sharers; <i>See</i> Hindu Law—Joint family ...	73
— status, dissolution of—Institution of a suit for partition; <i>See</i> Hindu Law—Gift	15
— tenants—Properties given by grandfather to grandsons as <i>Yatuk</i> ; <i>See</i> Hindu law	233
Judge, duty of; <i>See</i> Notes of arguments	42
Judges, when can act according to justice, equity and good conscience; <i>See</i> Execution sale	145
Judgment— <i>Criminal Procedure Code (Act V of 1898) Sec. 146—Omission to give reason.</i>	

No hard and fast rule can be laid down when High Court should interfere on the ground of the brevity of the order passed under section 146 of the Code of Criminal Procedure.

An order under section 146 of the Code of Criminal Procedure ran as follows: "I am unable to satisfy myself as to which of the parties is in possession of the land":

Held, that the omission to write at length the reasons for coming to such a conclusion was not a ground for remanding the case, as the High Court considered that the Magistrate gave full consideration to the evidence before he came to the conclusion at which he arrived. *Kansai Lal Das v.*

<i>Hyder Ali Khan Panl</i>	127
—, recitals in, if evidence; <i>See</i> Hindu law	233
Jurisdiction — Civil Court—Order made by Revenue officer under section 40 of the Bengal Tenancy Act without jurisdiction; <i>See</i> Rent, commutation of	473
— Court, if can vary a scheme for administration of charitable trust; <i>See</i> Scheme	281
— <i>Criminal Procedure Code (Act V of 1898), Secs. 145, 350, proviso (a)—Decision under Survey and Settlement Act.—Empty in record-of-rights—Presumption.</i>	

Per Newbould J.: A magistrate in deciding a case under section 145 of the Code of Criminal Procedure can go behind the orders passed in favour the petitioner under the Survey and Settlement Act and under the Bengal Tenancy Act, based on the survey proceedings.

Jurisdiction—(Contd.)

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Per Sukrawardy J. As the claim of the petitioner in the disputed land on the decision of the case under the Survey and Settlement Act was not established, the Magistrate had jurisdiction to find which party was in possession under section 145 of the Code of Criminal Procedure.

Per Newbould J. Though the Magistrate has not expressly stated that the presumption arising from entry in the record-of-rights has been rebutted, his order under section 145 of the Code of Criminal Procedure is not without jurisdiction.

The Magistrate who passed the order under section 145, did not himself record the whole of the evidence. He based his decision partly on the evidence recorded by another Magistrate before whom the proceedings were commenced :

Held, that the second Magistrate had jurisdiction to proceed with the case, the proviso (a) to section 350 of the Code of Criminal Procedure did not compel him to start enquiry *de novo* when an application to that effect was made on behalf of the petitioner.

The application of proviso (a) to section 350 of the Code of Criminal Procedure is limited to criminal trial and is not extended to enquiries which are also covered by the first portion of the section. *Syed Sadek Reza v. Sachindra Nath Roy* 128

— *Death of one of the respondents pending second appeal—No substitution of legal representative—Ignorance—Appeal heard and case remanded—Death became known after remand—Duty of lower appellate Court.*

During the pendency of appeal to the High Court, one of the respondents died; but owing to the ignorance, no substitution of his legal representative was made. The hearing in the High Court proceeded on the assumption that the parties were properly represented on the record, the appeal was decreed and the case remanded for re-consideration. When the case went before the District Judge, he was informed that one of the defendants had died during the pendency of the appeal to the High Court. On that, he held that the appeal could not be reheard by him :

Held, that the jurisdiction of the High Court was not ousted by reason of the death of one of the respondents.

That the District Judge should have reported the matter to the High Court for such action as might be deemed necessary in the events which had happened. *Abdul Aziz v. Lakhmi Chandra Majumdar* 494

— *Erroneous order of Collector under section 68 of the Bengal Embankment Act—No Specification of instalments—Suit against tenure-holders for payment in one instalment; See Embankment* 585

— *Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II. Cl. 35 Sub.cl. (ii)—Damages—Cause of action—Interest.*

Jurisdiction—(Contd.).

In the plaint it was alleged that the defendant in collusion with the railway officers took coal and misappropriated it or converted it to his own use. It was also stated that the plaintiff went to the defendant, that they discussed the matter, that the defendant executed the *chit* promising to pay, not damages at the market value, but a particular sum made up in a particular way. There was a reference in the plaint to the place at which the cause of action arose and reference was made to the fact that within the jurisdiction of the Court the *chit* was executed and the goods were delivered :

Held, that the suit was maintainable in the Small Cause Court, as the claim was for a particular sum of money shown by the *chit* and not for damages either for conversion or for compensation for theft.

In the absence of evidence of custom the Small Cause Court Judge had jurisdiction to grant interest at the high rate of 24 per cent per mensem.

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———— inherent—Placing parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed ; <i>See</i> Restitution	...	...	...	...	...	351
———— of Civil Court—Government's right of resumption—Saranjam grant of soil ; <i>See</i> Saranjam grant	...	...	...	...	...	464

Jury, discharge of—Misconduct—Inherent power—Criminal Procedure Code (Act V of 1898), sections 282, 283, 308—Criminal Procedure Code, if exhaustive.

Where the question of misconduct on the part of the jury or other similar sufficient cause arises, the Sessions Judge has inherent power to discharge the jury and empanel another.

Per Buckland J : Such power to discharge the jury on such grounds is one not to be exercised lightly nor until the Judge has satisfied himself by such form of enquiry as in the circumstances he can adopt that reasonable grounds for exercising such a right exist. The matter is one for the Judge's discretion.

So far as it deals with any point specifically, the Code of Criminal Procedure is exhaustive and the law is to be ascertained by reference to its provisions. Rahim Sheikh v. King Emperor	...	...	...	...	595
—, verdict of, upheld—Sessions Judge, opinion of, in his letter of reference inconsistent with that expressed in his summing up ; <i>See</i> Reference	...	...	...	...	30

Kidnapping—Penal Code (Act XLV of 1860), Sec. 363—Mahomedan minor girl—Custody of husband.

In the absence of any evidence that a lawful guardian entrusted the custody of a Mahomedan minor girl to her husband, a person cannot be convicted for kidnapping her from the custody of her husband.

Under the Mahomedan law, in the absence of the mother, mother's mother is the lawful guardian of a girl who has not attained puberty ; the hus-

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band is not the lawful guardian of her person. <i>Darajuddin Akanda v. King-Emperor</i>	329
Landlord, if can refuse tender—Arrears of rent tendered in full—amount of interest on arrears of rent inadequate—Cesses and interest on cesses, tender of, inadequate; <i>See</i> , Rent	222
Landlord, if can bring a suit for possession of land—Tenant dispossessed by trespasser—Prejudice; <i>See</i> , Possession, suit for	94
——— right of, to eject—Rent, receipt of, due prior to forfeiture, subsequent to service of notice under section 49 (b) of the Bengal Tenancy Act; <i>See</i> , Ejectment... ..	548
Lease—Chairman of Municipality granting lease—No resolution to grant the lease—Bengal Municipal Act (III B. C. of 1884), Secs. 34, 43, 44—Burden of proof—Requirements of statute—Presumption—Corporation, power of, nature and extent of—Rent, payment of, by lessee—Acceptance—Ratification—Minutes of proceedings of a meeting of the commissioners, copy of—Evidence Act (1 of 1872), Sec. 78 (5).	
A copy of the proceedings of a meeting of the Municipal commissioners, certified by the keeper thereof, is admissible in evidence, under sub-section (5) of section 78 of the Indian Evidence Act.	
Where a corporation is constituted by a statute, all persons and corporations are presumed to know the nature and extent of its powers.	
A lease of the disputed land was granted by the Chairman of the corporation in contravention of the Bengal Municipal Act. The lessee entered into possession and paid rent to the municipality for a period of six years. On the expiry of the term of the lease, the municipality requested the defendant lessee to vacate the land, but he insisted that the lease included a covenant for renewal which entitled him to continue in occupation. In a suit for ejectment:	
<i>Held</i> , that the burden lay upon the lessee to establish that the requirements of the statute were fulfilled.	
That as the transaction was <i>ultra vires</i> , it could not be validated by ratification, and the lessor was entitled to eject the defendant. <i>Akhay Kumar Chand v. The Commissioners of Bogra Municipality</i>	589
Lease—Offensive provisions, if can be separated; <i>See</i> Joint family	457
——— Oral settlement of rent—Privity of contract or estate: <i>See</i> , Rent, suit for	263
——— Restrictive Covenant—Covenant running with land—Transfer of Property Act (IV of 1882), sections 10, 12—Liability of transferor to pay rent.	
A permanent, heritable and transferable tenure (or <i>itmam</i> tenure) was created by a lease which contained a covenant to the effect that the tenant would, if he transferred the property, pay to the landlord, out of the purchase money in his hands, one-fourth as <i>Nazar</i> , and would obtain registration of the name of the transferee. The covenant further provided that if this step was not taken, the transfer would be invalid and	

Lease—(Contd.).

the tenant would continue to be liable for the rent After the grant of the lease, the lessee executed a mortgage in favour of the first defendant. Before the loan had been repaid, the lessee defaulted with the result that the landlord obtained a decree for arrears of rent and brought the tenure to sale. At this execution sale, the first defendant, the mortgagee, became the purchaser. Later on, the first defendant transferred the property purchased by him to the second defendant. In a suit for recovery of arrears of rent due.

Held, that the restrictive covenant in the lease was valid under sections 10 and 12 of the Transfer of Property Act and was operative as between the landlord and the tenant.

That the covenant was one running with the land.

That the first defendant was liable to pay rent under the terms of the lease.

That the decree for rent passed against the second defendant was allowed to stand, as he did not appeal against it.

The question whether the conveyance created a valid title in the second defendant as against the plaintiff was not considered.

A covenant is deemed to run with the land if it is of such a nature that it directly affects the use of the demised premises in a manner which the lessor thinks will be beneficial to him.

An express covenant not to transfer the land without the consent of the landlord is a covenant which sufficiently attaches to, and concerns the demised premises, and consequently is a covenant running with the land.

That in this case, the restriction imposed upon the right of alienation of the tenant, was operative during the entire period of the subsistence of the lease, <i>Saradakripa Lala v. Bepin Chandra Pal</i>	538
—, condition in, entitling landlord to realise rent by summary process— <i>Raiyat</i> , status of, if elevated; <i>See Ejectment</i>	548
—, if for a longer term than one year—Demise for one year—Option to continue the lease; <i>See, Registration</i>	475
—, if for a term of year—Test; <i>See Registration</i>	475
—, by manager—Lease, a collateral security for mortgage debt—Debt improvidently contracted by father and manager; <i>See, Joint family</i> ...	457
Leases , concurrent—English law; <i>See Rent</i> , suit for	263
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—, successive, effect of—Second <i>raiya</i> t, if can collect rent payable by the first; <i>See Rent</i> , suit for	263
Legacy , to heirs—Consent—Consent, how proved—Some of the heirs consenting, effect of; <i>See Mahomedan will</i>	302
Legal necessity —Recital of necessity—Lapse of time—Evidence of actual enquiry; <i>See Alienation</i>	319

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Legal necessity—Recitals in conveyance or mortgage—Evidence ; <i>See</i> Alienation	319
— necessity—Smaller amount sufficient to avert the pressure ; <i>See</i> Alienation	319
— practitioner, if can represent conflicting interest ; <i>See</i> Unprofessional conduct	48
— practitioner, if can undertake the discharge of inconsistent duties ; <i>See</i> Unprofessional conduct	49
Legal Practitioners Act, Sec. 13 (b)—Prosecuting mooktear drafting written statement for accused—Rule ; <i>See</i> Unprofessional conduct	48
—, Sec. 13 (f)—‘Acts done’—Acts endangering public peace ; <i>See</i> Privy Council	136
—, Sec. 13 (f)—‘Any other reasonable cause’—Acts endangering public peace ; <i>See</i> Privy Council	136
Legal representative, substitution of, not taking place in second appeal owing to ignorance of fact—Second appeal heard and case remanded—Death became known after remand—Duty of lower appellate Court ; <i>See</i> Jurisdiction	494
Legislature—Presumption—Construction put upon an Act ; <i>See</i> Limitation	108
Limitation— <i>Decree, execution of—Step in aid of execution—Continuation of proceeding.</i>	

Whether an application is or is not a step in aid of execution, depends on the circumstances of each case.

Objections under section 47 of the Code of Civil Procedure were filed on the 17th April, 1917 and on the 28th April, 1917, the decree holder applied for time for obtaining copies of the objections and citing witnesses. The cases were adjourned to 26th May, then to the 23rd June and again to the 25th June. No written statements were necessary and no witnesses were cited. On the 25th June, the decree-holder's pleader stated that he would not prosecute the cases any further and the execution cases were accordingly dismissed for non-prosecution. The objection cases were thereupon disposed of on the next day :

Held, that an application for execution presented on the 20th April, 1920 was barred by limitation as, under the circumstances of the case, the application for time filed by the decree-holder on the 28th April, 1917, did not constitute a step in aid of execution.

That the application could not be considered as continuation of previous applications, as the question was not raised in either of the Courts below and as in the application the decree-holder asked for other different reliefs. *Rajendra Lal Saha v Abdul Karim* 292

— *Limitation Act (IX of 1908), Sch. I. Art. 12—Decree-holder praying to bid but refused—Purchase by decree holder—Civil Procedure Code (Act XIV of 1882), Sec. 294 or (Act V of 1908) O. 21 R. 72.*

A purchase by a decree-holder who has not obtained permission from the Court is not void, nor a nullity but is only to be avoided on the applica-

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Limitation—(Contd.).

tion of the judgment-debtor or some other person interested. The fact that a decree-holder applied for permission and was refused, does not make any difference. He is still a decree-holder who has not obtained permission to bid. In the case of such a purchase, the question is not whether the decree-holder was contumacious, but whether the property had been really realised to the best advantage. If it had not the Court would set the sale aside; if it had, then it mattered not that the decree-holder bought without permission or that he had applied and been refused. If the sale is voidable only and not void, article 12, schedule I of the Limitation Act applies, and a suit to set aside such a sale must be brought within one year. *Rai Radha Krishna v. Blakeshar Sahay* ...

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————— *Limitation Act (IX of 1908). Sch I Arts 103, 104 116—Suit for recovery of dower debt—Money claim—Compensation and damages—Legislature—Presumption—Construction put upon an Act.*

Article 116, schedule I of the Limitation Act applies to suits for recovery of dower debt when there is a registered dower deed, although articles 103 and 104 would apply when there is no such registered instrument.

The expression compensation is not ordinarily used as an equivalent to damages, although compensation may often have to be measured by the same rule as damages in an action for the breach.

The legislature is presumed to know not only the general principles of law, but also the construction which the Courts have put upon particular statutes; where a section of an Act which has received a judicial construction is re-enacted in the same words, such re-enactment is treated as a legislative recognition of that construction. *Mahammad Mazaharul Ahad v. Mahammad Azimuddin Bhulan* ...

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————— *Limitation Act (IX of 1908), Sch.-I. Art. 113—Agreement for reconveyance—Mortgage for principal and interest—Charge.*

By a contract dated the 28th August, 1883 the defendant consented to reconvey on the 16th October 1889 certain villages on receipt of stated consideration. He also agreed not to sell to others without the consent of the plaintiff. The agreement provided for payment of interest on the purchase money until paid, and that until the principal and interest were paid, the plaintiff should mortgage the villages which the defendant consented to sell or other villages and execute a document therefor. On the 23rd August, 1900, the plaintiff called upon the defendant to execute a conveyance of the villages to him and to tender a mortgage for execution by him. The defendant refusing, the plaintiff brought this suit for recovery of possession from the defendants of villages on payment of such sum, if any, as might be found due.

Held, that no charge was created by the contract over the villages and that the plaintiff had no right to recover possession of the property absolutely or conditionally on his executing a mortgage deed or making a payment to the defendant. Hence the suit being one for specific per-

Limitation—(Contd.).

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formance of a contract, it was barred under article 113, schedule I of the Limitation Act. *Subramania Pillai v. Raja Kumara Venkata Perumal Raju Bahadur Varu*

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— *Limitation Act (IX of 1908), Sch. I. Art. 120—Suit for construction of will—Time, when runs—Specific Relief Act (I of 1877), Sec. 42 Proviso—Further relief—Declaratory suit.*

A suit for construction of a will is governed by article 120 schedule I of the Limitation Act, and the right to sue does not accrue from the death of the testator or the date of the probate of the will. So long at least as the estate is in the hands of the executor and the administration has not been completed, the right to obtain construction of the will is a continuing right.

A suit for a declaratory decree should not be dismissed on the ground that it is barred by the proviso to section 42 of the Specific Relief Act, unless it is quite clear that the plaintiff should seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for. The proviso to section 42 forbids a suit for a pure declaration without further relief, but it does not compel a plaintiff to sue for all the reliefs which could possibly be granted or debar him from obtaining a relief which he wants, unless at the same time he asks for a relief which he does not want. *Ramkamal Banik Saha v. Syam Saudar Banik Saha*

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— *Limitation Act (IX of 1908), Sch. I. Art. 181—Application for final decree—Decree on appeal, effect of—Decree fixing time for payment.*

Where a preliminary decree in a mortgage suit has been affirmed on appeal, an application made within three years of the date of the affirmance with a view to make a final decree is within the period prescribed under article 181 schedule I of the Limitation Act.

If the decree of the Lower Court is reversed by the appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the appellate Court, it is equally dead and gone, though in a different way, by being merged in the decree of the superior Court which takes its place for all intents and purposes; both the decrees cannot exist simultaneously.

Time runs from the date of the ultimate decree which terminates the litigation and becomes, as soon as it is passed, the only operative decree between the parties.

When time is fixed by the lower Court for payment of money and the decree of the lower Court is confirmed on appeal, the time for payment runs from the date of the decree of the appellate Court though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree. *Uma Charan v. Nibaran Chandra*

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Limitation Act, Sec. 12 (2)—Exclusion of time for obtaining copy of order—	
Conduct of appellant ; <i>See</i> Practice	86
— — — — —, Sch. I. Art. 12—Purchase by decree-holder without leave of	
Court—Suit to set aside sale ; <i>See</i> Limitation	430
— — — — —, Sch. I. Art. 113—Charge—Agreement for reconveyance—	
Mortgage for consideration money and interest ; <i>See</i> Limitation ...	416
— — — — —, Sch. I. Art. 116—Registered dower deed—Suit for recovery of	
dower debt ; <i>See</i> Limitation	108
— — — — —, Sch. I. Art. 120—Suit for construction of will—Right to sue,	
when arises ; <i>See</i> Limitation	482
— — — — —, Sch. I. Art. 181—Application for making final decree—	
Affirmance on appeal ; <i>See</i> Limitation	452
Magistrate, if can charge a procedure in the middle of trial ; <i>See</i> Procedure ...	105
— — — — —, if to commit accused to Court of Sessions—Charges exclusively	
triable by a Court of Session—Evidence to support such charges ; <i>See</i>	
Committing Magistrate, duty of	34
Mahomedan law— <i>Porebunder Halai Memons—Succession and inheritance</i>	
— <i>Exclusion of females—Custom—Cutchi Memons—'Memon', meaning</i>	
<i>of.</i>	
Halai Memons domiciled in Porebunder State, though Mahomedans, are	
not governed by Mahomedan law as to succession and inheritance and	
females are excluded from succession by custom and practice in the	
community.	
There are among the Mahomedans certain groups whose ancestors were	
Hindus and professed the Hindu religion, and were then converted to	
Islam. Among these groups may be reckoned Khojas, Suni Borahs,	
Molesalam Girasias, Cutchi Memons, Nasaspooria Memons and Halai Me-	
mons. With regard to the groups other than Halai Memons, the converts	
had retained their Hindu law relating to the exclusion of females from	
succession, and that law had been engrafted as a custom on the	
Mahomedan law although not in accordance with the rules of the Koran.	
Memon means a convert. The name Memon, however, has not been applied	
to all branches of Hindu converts, e. g. as in the case of the Khojas.	
There was a body which came from Sind and settled in Cutch, and these	
have been denominated as Cutchi Memons. Another body from the	
same place settled in the Halai Prant of Kathiawar, and these have been	
designated Halai Memons. Some of the Halai Memons pushed on to	
Bombay, where they have formed a community known as the Bombay	
Halai Memons. There was also an immigration to Bombay from Cutch	
and the Cutch Memons formed by themselves a separate community in	
Bombay from the Halai Memons. <i>Khatubai v. Mahomed Haji Abu</i> ...	131
— — — — — <i>Sunnis—Gift of entire Taluqdari estate—Reservation of</i>	
<i>usufruct by donor of part—Possession by donee of part only—Construc-</i>	
<i>tive possession of the remainder—Oudh Taluqdari Act—Sanad—Mean-</i>	
<i>ing of "Successors."</i>	

The word "successors" in the Oudh Taluqdari Sanad means those desig-

Mahomedan Law—(Contd.).

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nated persons who succeed in the event of an intestacy and not persons who take by sale, gift or bequests.

The reservation by donor of the usufruct does not by itself make the gift of the property void under Mahomedan law.

The object of the Mahomedan law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee, and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift.

For a valid gift *inter vivos* under the Mohammedan law, three conditions are necessary : (a) manifestation of the wish to give on the part of the donor ; (b) the acceptance of the donee, either impliedly or expressly ; and (c) the taking of possession of the subject-matter of the gift by the donee either actually or constructively.

Where there was a gift of the entire Taluqdari estate, part of which was taken possession of by the donee, constructive possession of the other part must be implied to satisfy the requirements of Mahomedan law as to valid gifts. *Mohamed Abdul Ghanl Khan v. Fakhr Jahan Begam* ... 1

————— as to gifts, object of ; *See* Mahomedan Law—Sunnis ... 1
Mahomedan married minor girl—Guardian—Penal Code, Sec. 363 ; *See*
Kidnapping ... 329

Mahomedan will—Construction—Legacy to heirs—Consent of heirs—Onus.

A testator under the Mahomedan law cannot leave a legacy to any of his heirs unless the other heirs agree ; but any single heir may so agree as to bind his own share. Such consent must be proved by the heir claiming the legacy, and will bind only those of the heirs whose consent is proved.

A. E. Salayjee v. Fatima Bibi ... 302

Maintenance—Criminal Procedure Code (Act V of 1898), Sec. 488—
Temporary stay—Agreement—Arrears of maintenance—Intention.

A mere temporary stay of wife with her husband for a few months, though may suspend the orders for maintenance under section 488 of the Code of Criminal Procedure has not the effect of cancelling it.

After the order for maintenance was passed, both parties put in a petition in which they agreed that the husband should pay his wife Rs. 10 a month as long as he remained at the house of her father. The petition ended thus : " We beg to ask the Hon'ble Court to pass a decree according to the above-mentioned term for Rs. 10 a month for maintenance" ;

Held, that the intention of the parties was, when they filed their petition, that the lady should abandon her claim to any arrears of maintenance which might have accrued due up to that date. *Parul Bala Debi v. Satis Chandra Bhattacharjee* ... 180

————— Will—Waiver—Election—Shariat, de facto—Expenses incurred—Voluntary payment.

Maintenance—(Contd.).

N, the husband of the plaintiff, died on the 22nd February, 1891, possessed of very considerable property, and by his will, dated the 5th April, 1889, after giving certain legacies, bequeathed two houses to the use of his wife for life. (The testator had in his lifetime disposed of one of the two houses. The other house was soon after the grant of probate made over to the plaintiff by the executors and she was in receipt of the rents and profits). The residue of his property was vested in trustees upon trust to pay his widow an annuity of Rs. 100, which she was to have in addition to her life estate in the houses; and she was to be allowed to occupy suitable rooms in the family dwelling house; and, the trustees were further to allow her Rs. 5,000, should she desire to proceed on pilgrimage. There has been since the death of the testator and up to the 14th August, 1905, when practically the litigation ceased, a litigation in respect of the administration of his estate. In that administration suit the present plaintiff raised the question that she was entitled to a widow's maintenance out of the estate, but the learned Judge left the matter open. The present suit was instituted on the 21st May, 1906, claiming maintenance out of the estate of her late husband.

Held that *prima facie* a widow being entitled to maintenance out of her husband's estate, the plaintiff, in the events that occurred, did not waive her right to that maintenance.

That there was no election by her, as there was nothing to show that she ever knew or was ever informed of what her rights were. She could not elect until she was fully made aware of what her rights were under the law. She was not called upon by the parties interested under the will in the estate or by anybody else to elect.

That as she was a Hindu widow and a *pardanashin* lady, she was entitled to special protection.

By an agreement dated the 4th February 1889 and made between N and his mother R in settlement of differences which had arisen between them, it was agreed that the daily and yearly worship of two idols be performed by and the management and care thereof should be entrusted to R. for whose use in such worship one or two rooms shall (if required) be set apart and the Babaji or Baistab employed for the services of the said idols should be under the control and act under the directions of the said R. Many years afterwards, and, by an agreement, the plaintiff carried on this worship. In respect of that worship she incurred certain expenses.

Held, that the plaintiff was not a shebait of the idols, and could not recover the money spent by her, the payment being a voluntary one. *Triguna Sundari Dasi v. Radharani Dasi*

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Maintenance, arrears of—Agreement—Intention—Criminal Procedure Code, Sec. 488; *See* Maintenance

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Manager, lease by—Lease, a collateral security for mortgage debt—Debt im- providently contracted by father and manager ; <i>See</i> joint family	457
Memon, meaning of ; <i>See</i> Mahomedan law	131
Memoos, Halai, Porebunder in Succession and inheritance—Females, exclu- sion of, by custom ; <i>See</i> Mahomedan law	131
Mesne profits— <i>Claims, splitting of—Civil Procedure Code (Act V of 1908) O. 2 R. 2.</i>	
Every suit shall include the whole of the claim arising from one and the same cause of action and not every claim or every cause of action which the plaintiff may have against the defendant. The test is, whether the cause of action in the subsequent suit is different from the cause of action in the earlier suit ? If the answer be in the affirmative, the subsequent suit is not barred, even though it might have been open to the plaintiff to unite the cause of action with the cause of action in the prior suit.	
The plaintiffs instituted a suit in 1913 against the defendants for recovery of possession of the disputed land with mesne profits upon establishment of title. That suit was decreed on the 22nd May 1914. The plaintiffs became entitled to recover possession of the land and also to realise the mesne profits which had accrued due antecedent to the suit. In July 1914, the plaintiffs executed the decree and obtained symbolical possession through Court. On the 12th February, 1917, the plaintiffs instituted a suit against the defendants for recovery of mesne profits subsequent to the institution of the suit and up to the date of delivery of possession. This suit was decreed. On the 20th April, 1918, the plaintiffs commenced this litigation against the defendants for recovery of mesne profits from the date of delivery of symbolical possession up to 13th April 1918 :	
<i>Held</i> , that Order 2 rule 2 of the Code of Civil Procedure did not operate as a bar in respect to the portion of the claim for mesne profits which had accrued due subsequent to the delivery of symbolical possession and before the institution of the first suit for mesne profits.	
The delivery of symbolical possession was the time of demarcation between possession antecedent and possession subsequent.	
Though the judgment-debtors were actually in possession and the decree- holders were consequently entitled to take not merely formal possession but actual possession, yet the formal possession given to the decree- holders was in the eye of law sufficient possession as against the judgment debtors. Hence the claim for mesne profits subsequent to the delivery of possession was not based on an identical cause of action. <i>Kulada Prasad Chatterjee v. Khudiram Misra</i>	543
Minor, non-representation of, in suit, effect of ; <i>See</i> Party	495
Misconstruction—Evidence partly in writing ; <i>See</i> Second appeal	580
Mmakshara, how interpreted in Behar ; <i>See</i> Hindu Law—Joint family	73
———— joint family, how severed—No actual division—Suit for partition ; <i>See</i> Hindu Law—Joint family	73
Money, payment of, time for, when runs—Decree of lower Court affirmed on an appeal—Appellate decree not fixing time for payment ; <i>See</i> Limita- tion	452

Mooklear, prosecuting, drafting written statement for accused—Rule; <i>See</i> unprofessional conduct	48
Mortgage—Evidence to vary amount of consideration, if admissible—Case determination of— <i>Fraud</i> .	
While want or failure or difference in kind of the consideration may be proved, evidence to vary the amount of consideration in a deed is inadmissible.	
The determination in a case should be founded upon a case either to be found in the pleadings or involved in and consistent with the case thereby made. This rule should not be applied in an abstract way regardless of the circumstances of the case.	
A party cannot come into Court with fraud on his lips and ask for a relief, as to such the Courts of justice are not open. <i>Annada Charan Sii v. Hargobind Sii</i>	552
— Purchase by mortgagee of equity of redemption—Civil Procedure Code (Act V of 1908), O. 34 R. 14—Receiver appointment of—Possession, not delivered—Sale in the interim, if valid.	
A mortgagee can, with the leave of the Court, purchase an equity of redemption at a sale held in execution of money decree obtained by him upon a claim independent of the mortgage; the equity of redemption on such sale passes to the purchaser and no right is left in the mortgagor which he can transfer.	
It is not enough that an order has been made directing the appointment of receiver. Until the appointment has been perfected and the receiver is actually in possession, a creditor is not debarred from proceeding to execution. The order appointing a receiver is for the benefit of the parties to the action. It does not affect third persons until the appointment is completed and perfected. A plaintiff, though he is a mortgagee, obtaining a decree as an ordinary creditor and not as the mortgagee, is a stranger to the suit on a mortgage in which a receiver was appointed.	
A sale held without the leave of the Court which appointed the receiver, is not void but voidable. <i>Raja Jagadish Chandra Deo Dhabai Deb v. Bhubaneswar Mitra</i>	265
Mortgage bond, suit on—Bond taken by a Commissioner for partition suit for work done, from a party; <i>See</i> Suit; if maintainable	406
Mortgagee, if can purchase equity of redemption at a sale held in execution of money decree obtained by him—Claim independent of mortgage; <i>See</i> Mortgage	265
— obtaining decree as ordinary creditor, position of—Mortgage suit in which receiver appointed; <i>See</i> Mortgage	265
Mortgagor not attending to admit execution—Registration Act, Sec 35; <i>See</i> Registration	377
Musulman Wakfs Validating Act, if retrospective; <i>See</i> Wakf	56
—, if validates deeds executed before its date; <i>See</i> Wakf	56

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'Necessity'—Alienation by Hindu widow ; <i>See</i> Hindu widow ...	356
Notes of arguments— <i>Pleader, if can submit—Judge duty of—Pleader going to Criminal Court—Professional conduct.</i>	
When a case has been fully argued before a Judge, it is not necessary for the pleaders to submit notes of their arguments. It is the duty of the Judge to take such notes of the arguments as he thinks fit when they are being submitted to the Court ; and if he feels that he has not fully appreciated any part of the arguments which have been submitted to him, it is open to him to call the parties before him so that any further argument may be presented in open Court in the presence of the other side. If it becomes necessary, as in some exceptional case for the Judge either to require or to receive notes of the pleader's arguments, such notes ought not to be submitted to the Judge by the pleader on one side, without first submitting the notes to the pleader on the other side. If in any case a pleader desires to submit to the Court the notes of his argument or of any further argument, which he thinks in the interest of his client ought to be put before the Court, he should submit them to the pleader on the other side, so that the latter may have an opportunity of making any remarks or any criticism in respect thereof.	
Where the allegation was that A. a pleader, laid false information before a Judge with regard to the conduct of B, another pleader in relation to notes of arguments which B had prepared :	
<i>Held</i> , that such matters related to professional conduct and should be settled by some tribunal or person capable of dealing with such matters and that a criminal Court was not such a tribunal to settle the matter.	
<i>Amjad Ali v. Suresh Ramjan Pal</i> ...	42
Nullity and irregularity—Test ; <i>See</i> Execution sale, nature of ...	447
'Or' if always disjunctive ; <i>See</i> Ejectment ...	478
Oral evidence— <i>Nature of—Dower—Evidence laid after a long time.</i>	
When the evidence was laid, thirty-six years had elapsed since the date of the marriage and the verbal agreement as to the amount of dower money relied on. There was no documentary evidence, and the case rested entirely on the recollection of persons who were present at the marriage :	
<i>Held</i> , that in such circumstances the oral evidence of an agreement must be clear and convincing in order to establish a claim against the estate of the man who was said to have been a party to it. <i>Hafizam Bibi v. Suba Bibi</i>	461
Order of settlement authorities pronounced in proceedings <i>inter partes</i> , nature of ; <i>See</i> Appeal ...	491
Oudh Estates Act, Sec. 23—'Ordinary law'—Rule of succession prescribed by Sanad ; <i>See</i> Succession ...	306
Oudh Talukdari Sanad—'Successors'—Persons taking by sale, gift or bequest ; <i>See</i> Mahomedan Law—Sunnis ...	1
Pardanashin lady—Hindu widow—Special protection ; <i>See</i> Maintenance ...	20
— lady— <i>Litigation—Compromise—Decree—Consent—Onus—Ap-</i>	

Pardamashin lady—(Contd.).

peal—Security for Costs—Court deposit under compromise decree—Estoppel.

The appellant, a *Pardamashin lady* sued and obtained a decree against the respondents. When the respondents' appeal against the decree was pending in the High Court, the matter was compromised on the appellant's behalf and the respondents deposited a sum of money in Court under the compromise. In a suit by the appellant challenging the validity of the compromise,

Held, that the onus of proving that the compromise was made with full knowledge and consent of the appellant lay on the respondents :

Held also, that the fact of her having applied and obtained an order from the Court to hold the deposit made under the compromise as security for the costs of the respondents in her appeal to the Privy Council, did not estop her from impeaching the validity of the decree.

Decree of the High Court reversed. *Srimati Sarat Kumari Dasi v. Amulyadhan Kundu* 301

Paral will, construction of—English decision ; *See* will 420

Partial partition, when allowed ; *See* Partition 191

Partition—Agreement for partition—Suit for specific performance, essentially a suit for partition—Agreement, if requires registration—Registration Act (XVII of 1908), Sec. 17 sub-sec. (2) Proviso 5—Agreement, if admissible in evidence.

By a *yadast*, or memorandum of agreement, the parties agreed to divide their joint properties both in Travancore and in British territories according to certain specified shares. The agreement provided for the execution of a further deed effectuating the partition. Later, effect was given to this agreement in respect of the properties in Travancore. This document was registered in Travancore, and effect was given to it in respect of the properties situated in that State. No division, however, was made of the properties in Tinnevely or separate possession to the parties of their respective shares. As the defendant evaded the fulfilment of the agreement, the present suit was brought for its enforcement.

Held, that the suit was one substantially for partition. •

The onus was on the person to establish that the properties he claimed as the self-acquired properties, bore that character.

That as the agreement merely created a right in the person claiming the relief, it did not require registration under proviso 5 to sub-section 2 of section 17 of the Registration Act and it was admissible in evidence *Rajangam Ayyar v. Rajangam Ayyar* 435

— — — No actual division by metes and bounds—Intention ; *See* Hindu law 233

— — — *Property—Partial partition, when allowed—co-tenant, right of, to partition.*

Partition (Contd.).

Although partial partition by suit is allowed where different portions of the property lie in different jurisdictions, or some portion of the property is at the time incapable of partition or is from its nature impartible or is held jointly with strangers who cannot be joined as parties to a general suit for partition, these exceptions must not be taken to have frittered away the fundamental rule that a partition suit should embrace all the joint property. This rule is neither arbitrary nor technical; it is founded on sound and weighty reasons. If the rule were not recognised and firmly applied, multiplicity of litigation would be the inevitable result. If suits for partition were allowed to be instituted in fragments, the jurisdiction of the trial Court and the forum of appeal might be altered. The rule further ensures a just partition; parties might otherwise be greatly prejudiced as regards equitable distribution, retention of possession, liability for improvements, and adjustment of accounts. There may be very special cases where the application of the rule may be justly relaxed.

A co-tenant whose title to an undivided share of joint property is admitted or is clear, is entitled to partition as a matter of right; a difficulty in making a division of the subject matter or a resulting prejudice to some of the co-tenants is not a sufficient ground for refusing a partition.

Since partition can be claimed as a matter of right, a co-tenant is not required to make a demand or to agree upon terms prior to institution of suit. But although, as a general rule, all joint property of the co-tenant must be included in a partition suit, it is within the power of co-tenants, by mutual agreement, to make partition of a part only of the joint property, retaining the rest in common.

As a general rule, a partial partition cannot be compelled against co-tenants who do not consent thereto. But if some of the co-tenants desire to continue holding the moieties together and undivided, the Court may permit them to do so, and instead of making a separate allotment to each, set apart to all who so desire, an allotment to be held by them jointly. If it appears, however, that all the defendants have already received all that is equitably due to them, the remainder may be awarded to the plaintiff; this is not partial but complete partition.

Rajendra Kumar Bose v. Brojendra Bose	191
Partition, complete — Defendants received all that is equitably due to them; <i>See</i> Partition	191
—, partial, when allowed; <i>See</i> Partition	191
—, partial, if can be compelled against non-consenting co-tenants; <i>See</i> Partition	191
—, refusal of — Difficulty in making division of subject matter; <i>See</i> Partition	191
—, refusal of — Resulting prejudice to some of the co-tenants; <i>See</i> Partition	191
—, suit for, institution of — Joint status, dissolution of; <i>See</i> Hindu Law—Gift	15

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Partition—(Contd.).	
———, of property —Test; Hindu law	233
——— suit — Decree—Provision for marriage expenses of members of family; <i>See</i> Hindu law gift	15
——— suit, nature of; <i>See</i> Partition	191
——— suit, rule regarding; <i>See</i> Partition	191
Party—Minor, non-representation of, effect of.	
No person can be appointed a <i>guardian ad litem</i> of an infant without his consent,	
Where the mother of an infant was appointed guardian without her consent, the infant not being represented was not a party to the litigation and was not affected by any decree passed against him: <i>Umapati Samanta v. Shelki Masietulla</i>	496
—— coming to Court with fraud; <i>See</i> Mortgage	552
Pauper—Minor, a pauper—Next friend, not a pauper—Civil Procedure Code (Act V of 1908), O. 33—English law.	
A minor who is not possessed of sufficient means within the definition of pauperism for the purpose of order 33 of the Code of Civil Procedure can sue in <i>forma pauperis</i> by a next friend although the latter is not a pauper. The wealth or other circumstances of the minor's relation in general are not material under the Code. The law of India in this respect is different from that prevailed in the Court of Chancery in England. <i>Nanbala Dassya v. Jamini Sundari</i>	394
Penal Code, Secs. 147, 225, offences under, if liable to separate punishment—	
Criminal Procedure Code, Sec. 35; <i>See</i> Punishment, separate	171
———, Sec. 363—Guardian—Mahomedan married minor girl; <i>See</i> Kidnapping	329
———, Sec. 503—Threat to property—Effect on person threatened; <i>See</i> Criminal intimidation	526
Permanent tenancy — Long possession and uniform payment of rent; <i>See</i> Ejectment	478
——— tenancy — Material elements; <i>See</i> Ejectment	478
Permission to bid — Decree-holder's application to bid refused, effect of <i>See</i> Limitation	430
Pleader—Certificate, renewal of—Government service, disclosure from—Petition to contain full and complete disclosure—Suspension of practice, temporary.	

The petitioner was enrolled as a pleader on the 19th July, 1907 and his certificates was renewed in the year following. He subsequently obtained an appointment in the Police service. On his application, High Court permitted him to resume practice after relinquishing that employment. On the 9th January, 1920, the petitioner was discharged from Police service in connection with a criminal case instituted by the petitioner which resulted in a conviction of the accused. As there was a divergence between the story outlined by him in the first information and his state-

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Pleader—(Contd.).	
ment on oath in Court, he was removed from the service. On the 17th February, 1920, he forwarded an application to High Court through the District Judge for renewal of his certificate. In this petition he stated that he was no longer in Government service but did not state the facts which led to his removal from Government service ;	
<i>Held</i> , that it was incumbent on him to make a full and complete disclosure in his petition.	
That his conduct was not such as would justify the refusal of the present application.	
That as his conduct was not calculated to inspire absolute confidence, his certificate was not renewed at once but was ordered to be renewed with effect from 1st January, 1921. <i>In re Mukunda Lal Dhar</i>	391
— desiring to submit to the Court the notes of his argument or of any further argument—Precedure ; <i>See Notes of arguments</i>	42
Pleaders, if can submit notes of arguments, after arguments before a Judge <i>See Notes of arguments</i>	42
Pleading — Agreement effecting severance of joint family not pleaded—Agreement leading up to division ; <i>See Hindu Law—Joint family</i>	73
Possession—Criminal Procedure Code (Act V of 1898), Sec. 145—Decree of civil Court, validity of, if can be questioned—Symbolical possession—Decree inter partes.	
In a proceeding under section 145 of the Code of Criminal Procedure, the Magistrate cannot go behind the decision of the civil Court in the matter.	
It is not for the Magistrate to question the validity of a decree that has not been set aside by a competent Court.	
When the decree is <i>inter partes</i> , it is immaterial whether the delivery of possession is symbolical or not.	
In this case, the Magistrate in disregarding the delivery of possession, acted with gross irregularity and in a manner that was likely to cause a failure of justice. <i>Akhoy Mondal v. Basu Rai</i>	256
Possession, delivery of—Symbolical possession—Decree, <i>inter partes</i> ; <i>See Possession</i>	256
—, formal, effect of—Decree-holder and judgment debtor ; <i>See Mesne profits</i>	543
—, suit for— <i>Suit by landlord—Land in possession of tenant.</i>	
It is open to a landlord, when his title is in jeopardy from the aggression of a third person and where his title may be damaged by a denial of his rights over the land, to bring a suit for the purpose of having his rights declared as against such wrongdoer and for the purpose of being put into possession of the land as against him.	
The plaintiffs were prejudiced by the intrusion of defendant No. 1 into their tenancy. His occupation resulted in the ouster of the real tenant defendant No. 7. The result was that defendant No. 7 failed to collect	

Possession—(Contd.).

rent from his under-tenants and stopped payment of rent to the plaintiffs :

Held, that it was open to the plaintiffs to institute a suit to recover possession of the land by declaration of their title such possession when recovered from defendant No. 1 to be held by the plaintiffs through defendant No. 7—the tenant who had been dispossessed by the trespasser. *Raj Kumar Mandal v. All mia* 94

Practice—Calcutta High Court Rules Ch. 32, r. 3—Procedure—Appeal from order—Limitation—Exclusion of time requisite for obtaining copy of order—Diligence—Indian Limitation Act (IX of 1908) Sec. 12, Sub-Sec. 2.

On the 30th August, 1918, the appellant presented an appeal against an order made on the 16th July against him but he failed to file along with his memorandum of appeal, a copy of the order appealed against, which he was required to do under rule 3 of chapter 32 of the Calcutta High Court Rules. The order was not however filed till the 3rd September. The appellant did not apply to have the order drawn up and he returned the draft order sent to him on the 7th August only on the 16th August :

Held, that in computing the time requisite for obtaining copies under section 12 sub-section 2 of the Indian Limitation Act, the conduct of the appellant must be considered and that the appeal was out of time as he failed to take reasonable and proper steps to obtain the copies required :

Pramatha Nath Roy v. William Arthur Lee 86

——— Special leave to appeal—Reason for refusal ; *See* Privy Council ... 136

President of Calcutta Improvement Tribunal, if can hold summary enquiry under section 20 of the Calcutta Rent Act ; *See* Summary enquiry ... 298

Presumption — Acquiescence—Legal necessity—Lapse of time ; *See* Alienation 319

Presumption—Bengal Tenancy Act (VIII of 1885), Sec. 50, sub-section (2)—Presumption, when arises—Tenant, what to prove.

For a presumption to arise under section 50 sub-section (2) of the Bengal Tenancy Act what a tenant has got to establish is not that rent has been actually paid at a uniform rate during 20 years, but that the tenant has held at a rent or rate of rent which has not been changed during 20 years. Such holding may be established even if it is not proved that rent has actually been paid during a portion of the 20 years.

In order to establish uniform payment of rent for 20 years, it is not necessary to produce rent receipts for the entire period of 20 years preceding suit. Uniform payment for the wanting years may be proved otherwise by other proof and from surrounding circumstances. *Satis*

Chandra Biswas v. Nil Madhab Saha 598

——— Construction put upon an Act—Legislature ; *See* Limitation ... 108

——— Corporation constituted by statute—Corporation, nature and extent of, powers of ; *See* Lease 589

Presumption—Entry in record-of-rights—Order for final publication pending appeal—Production of entry in appellate Court ; <i>See</i> Appeal ...	491
————— <i>Evidence Act (I of 1872), Sec. 114 (e)—Sheristadar signing processes 'by order'—Civil Procedure Code (Act V of 1908), O. 21 r. 24 (2).</i>	
Warrants of attachment of the movable property in pursuance of decrees were entrusted to a peon of the civil Court for execution ; they were signed by the sheristadar who purported to make that signature 'by order' :	
<i>Held</i> , that presumption under section 114 (e) of the Evidence Act could be applied and the statement that appeared in the face of the warrant that the sheristadar signed 'by order' could be presumed to be true and that in the absence of anything to suggest the contrary, he was actually the officer to sign process as required by clause 2 of rule 24 order 21 of the Code of Civil Procedure. <i>Girdhar Sarkar v. Hailsh Chandra Chowdhury</i>	331
————— Hindu family residing in particular province in India ; <i>See</i> Hindu law	233
————— <i>Hindu law—Joint family—Dayabhaga school—Business and ancestral property—Bequest of movable and shares of joint business by one member—Movables and immovables acquired out of the income and profits of joint business—Joint property income mixed up with the business accounts—Effect—General presumption.</i>	
Three brothers governed by Dayabhaga school of Hindu law inherited certain immovable properties and a joint business in yarns and cloth. One of the brothers died in 1902, leaving a Will by which he gave power to his widow to adopt, his immovable properties to go to such adopted son and his movables and the third share in the joint business to go to his brother Jagamohan. The widow adopted and the family continued to live and carry on business jointly as before. The income from the joint properties was mixed up with the accounts of the joint business. Movable and immovable properties were acquired from time to time out of the income and profits of the joint business. On a claim by Jagamohan to a third share in all the properties acquired out of the income of the joint business.	
<i>Held</i> , that the circumstances were not sufficient to displace the general presumption that arises when members of a joint family, who have control over the joint estate, blend that estate with property in which they have separate interests ; that the effect in such transactions was to cause the whole property to become joint and that Jagamohan was only entitled to an equal share with the other branches of the family in all the properties. <i>Rajanikanta Pal v. Jagamohan Pal</i>	515
————— Migration of Hindu family ; <i>See</i> Hindu law	233
————— Presentation accepted by Sub-Registrar as in proper form ; <i>See</i> Registration	377
————— <i>Saranjam grant, if grant of revenue ; See Saranjam gran</i> ...	464

Privy Council—Appeal—Special leave—Reasons for refusal—Practice—Pleader—Cancellation of *sapad*—Court's discretion—Legal Practitioners Act. (XVIII of 1879), S. 13 (f)—“Any other reasonable cause.”

The established practice of the Privy Council in not giving reasons for their refusal of petition for special leave is departed from in this case as a matter of concession.

S. 13 (f) of the Legal Practitioners Act of 1879 is not confined to acts done in a professional capacity and Courts have a discretion in dealing with the pleader for any such acts. *Shankar Ganesh Dabir v. The Secretary of State for India in Council* 136

Procedure—Changing procedure in the middle of a trial—Regular trial changed into summary trial.

A Magistrate cannot change to the prejudice of an accused a procedure in the middle of a trial.

A Magistrate caused the examination-in-Chief of the prosecution witnesses to be recorded in the form of a narrative under section 359 of the Code of Criminal Procedure, while the cross-examination of those same witnesses and the whole evidence of the defence were taken down summarily under Chap. XXII :

Held, that the Magistrate's procedure was not authorised by law and caused prejudice to the accused under the circumstances of the case. *Gosto Behary Basu v. Balstam Dass Deura* 105

Procedure, defect in, effect of—Prosecution of legal practitioner—No recording of statement ; See Contempt of Court 535

Proceeding, stay of—Transfer—cross cases—Trial by different Magistrate ; See Trial, simultaneous 410

Professional conduct—Pleader laying false information before a Judge with regard to the conduct of another pleader ; See Notes of arguments ... 43

Property, title to—Reference to arbitration in respect of property—Conveyance by one of the parties after award ; See Award, effect of 542

Prosecuting mooktear drafting written statement for accused—Rule ; See unprofessional conduct 48

Provincial Small Cause Court Act, Sch. II. Cl. 35 Sub Cl. (ii)—Damages—Cause of action ; See Jurisdiction 399

Public policy—Stranger purchaser not affected by reversal of decree for error or irregularity ; See Execution sale 145

Punishment separate—Criminal Procedure Code (Act V of 1898), Sec. 35—Distinct offences—Offences under sections 147 and 225 I. P. C. (Act XLV of 1860).

Under section 35 of the Code of Criminal Procedure, a person convicted of offences under section 147 and 225 of the Indian Penal Code, is not liable to separate punishment for each offence, as the two offences are not distinct. *Sarat Chandra Ghosh v. Emperor* 171

Purchase, bona fide doctrine of ; See Execution sale 145

—, by decree-holder without leave of Court, effect of ; See Benamidar, suit by 403

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Purchase by decree-holder without leave of Court, effect of ; <i>See</i> Limitation ...	430
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— — — — —, title of—Mortgage suit against life estate holder's administrator—Representative of testator not brought on record—Sale in execution of mortgage decree ; <i>See</i> will ...	90
Putni—Creation of putni interest between zemindari and putni—Sale of such interest under Putni Regulation, if valid—Sale, if can be questioned collaterally.	
A putni tenure cannot be created over another putni. A zemindar can assign his right to receive rent from the putnidar.	
The mere giving of the name of putni to the interest created between the zemindar and putnidar, does not make it a putni as contemplated by the Putni Regulation, so as to bring into play all the provisions of the law. A sale of such interest held under the Regulation is without jurisdiction and the purchaser acquires no title. Such a purchaser's right can be questioned by the defendant putnidar in a suit brought by him for rent. <i>Rajendra Narain Chowdhuri v. Khan Bahadur Moulvi Abu Nasar Ahlya</i> ...	
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Putni lease ' <i>Rajaswa</i> ', meaning of—Demand from the Zemindar, not necessarily a demand on the Zemindari—Rent, if includes cess.	
<i>Per Curiam</i> : The word ' <i>Rajaswa</i> ' in a putni lease is wide enough in its natural meaning to include cess payable under the Cess Act of 1871 and 1880.	
<i>Per Richardson J</i> : A demand from the Zemindar is not necessarily the same thing as a demand on the Zemindari. But a demand, from the Zemindar of an impost payable by him in respect of the lands comprised in his estate is a demand on the zemindari.	
Rent as defined in the Bengal Tenancy Act includes cess.	
<i>Per Suhrawardy J</i> : Where there is no ambiguity in the meaning of a word or sentence in a document it is not within the province of the Court to look to the conduct of the parties, which might have been due to neglect, oversight or ignorance on their part. <i>Raja Bhupendra Narayan Singha Bahadur v. Midnapur Zemindari Company Limited</i> ...	
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—, Regulation, proceedings, under, nature of—Arrears of putni rent ; <i>See</i> Rent ...	222
— Regulation, sale under, if valid—Sale of interest created between zemindar and putnidar ; <i>See</i> Putni ...	141
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— tenure, if can be created over another putni ; <i>See</i> Putni ...	141
Putnidar, if can question purchaser's right, in a suit for rent—Purchase of interest created between Zemindar and putnidar under Putni Regulation ; <i>See</i> Putni ...	141
Raiyat — Status, if elevated—Condition in lease entitling landlord to realise rent by summary process ; <i>See</i> Ejectment ...	548
' <i>Rajaswa</i> ' — Cess payable under the Cess Act ; <i>See</i> Putni lease ...	536
Ratification, validation by — <i>Ultra vires</i> transaction ; <i>See</i> Lease ...	589

Receiver—Appointment of—Appeal, pendency of—Impartible raj.

Where the subject matter of the litigation was a valuable impartible raj including forest and mines, which had been under the management of the Court of Wards and the Encumbered Estates Act authorities for nearly half a century the High Court appointed a Receiver instead of allowing execution of the decree of the trial Court to proceed at the instance of the successful claimant pending disposal of the appeal by the Court. *Sri Pratab Chandra Deo Dhabal Deb v. Sri Raja Jagadish Chandra Deo Dhabal Deb* 417

Receiver, appointment of, pending appeal—Impartible raj including forest and mines—Decree, execution of; *See* Receiver ... 417
 ———, Order appointing, if and when affects third person; *See* Mortgage 263

Reference—*Criminal Procedure Code (Act V of 1898), Sec. 307 (3)—Opinion of the Sessions Judge in his letter of reference inconsistent with that expressed in his summing up—Verdict of jury upheld.*

On the statements made by the deceased to the various witnesses, and in his deposition, there was a grave case against the accused. As regards the evidence which related to the finding of the knife and the ownership of it, the opinion of the Judge expressed in his letter of reference was inconsistent with that expressed to the jury in his summing up. Owing to the direction to the jury the latter had reason to come to the conclusion that as regards the ownership of the knife and as regards the alleged finding of the knife, they could not rely upon the evidence for the prosecution:

Held, that the jury were Judges of the facts, and having regard to the direction of the Judge as regards the ownership of the knife and the finding of it, the High Court held that the jury were entitled to take the view that it would not be safe to convict the accused, and upheld the verdict of the majority of the jury. *Emperor v. Sristidhar Majumdar* ... 30

——— Judge, if can make a reference on minor charges—Judge accepting jury's verdict on graver charges; *See* Committing Magistrate, duty of ... 34

Registration—*Document, presentation of—Registration Act (XVI of 1908), Secs. 32 Sub-Sec. (c) 35, 75 Sub-Sec. (2)—Power of attorney—Imperfectness—Burden of proof—Duly presented—Repetition of original steps—Endorsement on a document by registering officer.* •

The Registration Act has imposed several conditions regulating the presentation of documents for registration and those conditions, framed with a view to meet local circumstances should not be weakened or strained on the ground that they may appear to be exacting and strict.

If the mortgagor does not attend to admit execution, the Sub-Registrar is bound under section 35 of the Registration Act to refuse to register, leaving the interested parties to appeal to the Registrar under section 73.

The power of attorney mentioned in sub-section (c) of section 32 of the Registration Act must not be general in its form, but must confer the special authority to present on behalf of the principal, and even though

Registration—(Contd.).

the Sub-Registrar accepts the presentation under a general power of attorney, it is open to any interested party to show that the power of attorney was in fact imperfect. The fact that the presentation is accepted by the Sub-Registrar as in proper form is, however, *prima facie* evidence that the conditions have been satisfied; and after such acceptance, the burden of proving any alleged informality rest on the person who challenges the registration.

The endorsement on a document by the Sub-Registrar has no statutory effect; it is only the evidence to show that the presentation has been accepted by the Sub Registrar, and its acceptance by him, he being the officer whose business it is to see that all essential regulations are regarded is *prima facie* evidence that the document was regular in all respects.

The expression 'duly presented' in sub-section (2) of section 75 of the Registration Act, means "presented in accordance with all the formalities imposed by section 32." This sub-section is mandatory and compels the registering officer to effect the registration if the document be duly presented. If this procedure be followed and registration is refused, the processes of the Court are open for the purpose of compelling obedience, a privilege that would not be enjoyed if the formalities were omitted.

There is nothing in section 75 of the Registration Act to prevent the Registrar or the Sub-Registrar from registering a document which had been duly presented, and the execution of which has been proved, without requiring a repetition of all the original steps, but he cannot be compelled to register unless the document be 'duly presented' a second time. *Raj Bahadur Chhotey Lal v. The Collector of Moradabad* ...

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—Lease, if for term of year or not—Test—Option to continue the lease—Registration Act (XVI of 1908), Sec 17 (d).

In the determination of the question whether a lease is for a term of year or not, the test to be applied is, whether there is a present demise for a year only or for a period of more than one year.

Where there is no demise for a longer period than one year, the fact that the tenant has the option at the end of the term of one year to continue his tenancy does not make the lease a lease for a longer term than one year.

Clause (d) of section 17 of the Registration Act applies when the lease is for a term longer than one year. *Falruddin v. Asrab Ali* ...

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—Registration Act (XVI of 1908), Secs. 2, 32—'Representative'—Clerk of District Court, if representative—Security bond given to District Judge—Bond presented by Clerk of District Court.

The provisions of section 32 of the Registration Act are imperative, and, unless a document presented for registration is so presented by one of the persons described in the section the presentation does not give to the Registrar the indispensable foundation of his authority to register it, and the registration, if made, is invalid.

Registration—(Contd.).

The word 'representative' is a term of ambiguous meaning, and must be construed according to its context. That word in section 32 of the Registration Act, refers to legal personal representative, or (by virtue of section 2) the guardian or committee of the person described and does not include a clerk or agent.

A mortgage bond given by certain persons to the District Judge to secure the performance of any order which His Majesty in Council might make on an appeal then pending, was presented for registration by a clerk of the District Court. The obligors attended for the purpose of admitting execution, but did not join in the presentation. The document was not presented by any agent holding a power of attorney :

Held, that the registration of the security bond was invalid and that the security was insufficient.

That the clerk was not a representative of the District Judge within the meaning of paragraph (b) of section 32 of the Registration Act. *Ma Shede Mya v. Maung Ho Huang* ... 343

Registration, document, presentation of, for—Rules, *See* Registration ... 377

———, of security bond given to District Judge—Presentation of document by clerk of District Court ; *See* Registration ... 343

Registration Act, Sec. 17 (d)—Lease longer than one year ; *See* Registration ... 475

———, Sec. 17 Sub-sec. (2) Proviso (5)—Agreement for partition ; *See* Partition ... 435

———, Sec. 32 — Document presented by unauthorised person, effect of ; *See* Registration ... 343

———, Sec. 32 — 'Representative' ; *See* Registration ... 343

———, Sec. 32 (c)—Power of attorney, nature of ; *See* Registration ... 377

———, Sec. 75 — Document to be 'duly presented' a second time—Procedure ; *See* Registration ... 377

———, Sec. 75 Sub-Sec. (2) — 'Duly presented' ; *See* Registration ... 377

———, Sec. 75 Sub-Sec. (2) mandatory ; *See* Registration ... 377

Religious acts—Hindu system ; *See* Alienation ... 383

Remand — Inherent jurisdiction—Second appeal—Civil Procedure Code, O. 41 R. 25 ; *See* Appeal ... 122

Rent—*Enhancement*—*Enhancement not paid immediately preceding period for which rent claimed—Bengal Tenancy Act (VII of 1885), Sec. 9 cl. (a) Proviso and Sec. 50—Rent enhanced not in writing registered.*

The true effect of section 29 of the Bengal Tenancy Act is that there is no permanent enhancement when there is an attempt to increase rent with writing registered. The legislature allows the landlord to realise rent at the increased rate when the rent at that rate has been actually paid for a continuous period of not less than three years immediately preceding the period for which rent is claimed.

Enhanced rent was actually paid from 1314 to 1319 but not in 1320. The rent was not enhanced by writing registered. A suit was brought claiming at enhanced rate for 1321 to 1324 :

Rent—(Contd.).

Held, that the plaintiff was not entitled to claim rent at enhanced rate.

Section 50 of the Bengal Tenancy Act contemplates a case where a tenancy has been *held*, at a certain rate; section 29 to a case where rent has been actually *paid* for a period of three years. *Janaki Bala Ray v. Enst Mandal*

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Rent—Monthly instalments—Agreement before enactments of sections 53 and 67 of the Bengal Tenancy Act (VIII of 1885)—Interest, how calculated—Valid tender—Bengal Tenancy Act, Sec. 55—Landlord, if bound to accept amount less than due to him—Tender of interest, not adequate—Part satisfaction—Proceedings under Putni Regulation (VIII of 1819), nature of—Proceedings against recorded but deceased putnidar—Sale, if valid.

There may be an agreement for payment of money rent in modification of the provision of four instalments.

Where a contract to pay rent in monthly instalments and in default interest would be charged according to law, was made before sections 53 and 67 of the Bengal Tenancy Act, were enacted.

Held, that the interest at the rate of twelve and half per cent. per annum was to be calculated from the date of default.

A creditor is not bound to accept less than his whole debt, and there can be no valid tender of part of an entire and indivisible debt.

But there is nothing to prevent the creditor from accepting the amount tendered in part payment, and his doing so will not preclude him from afterwards claiming the residue of his account provided that the debtor did not make it a condition of his tender that it be accepted in discharge of the whole.

Section 55 of the Bengal Tenancy Act does not abrogate the rule that a creditor cannot be compelled to accept any sum in part satisfaction of his dues. That section treats, not of tender but of appropriation.

Where the amount due as arrears of rent was tendered in full, but what was tendered as the full amount due on account of interest on rent, cesses and interest on cesses, was adequate.

Held, that the landlord was competent to refuse the tender so made. That he was not bound to accept even the principal amount of rent, when the interest due thereon was not tendered in full. The principal and interest constituted one individual and entire claim.

A tender must be unconditional, or, at all events, free from any condition to which the creditor may rightfully object.

Proceedings under the Putni Regulation, taken for the realisation of arrears of putni rent, are against the tenure, and the mere fact that in the application to the Collector, the zemindar mentions the name of a deceased putnidar, which stood on his books, does not make the sale held under the Regulation invalid.

Rent—(Contd.).

It is incumbent on persons, who acquire an interest in a patni tenure by succession, to get themselves registered in the books of the landlord, under section 15 of the Bengal Tenancy Act. If they fail to take the necessary steps and at the same time make default in the payment of rent, they cannot very well be heard to assail the legality of a sale under the Patni Regulation on the ground that their names were not mentioned in the application to the Collector. *Behari Lal Biswas v. Nasimannassa Bibi*

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—, *commutation of—Bengal Tenancy Act (VII of 1885), Sec. 40—Notice, if to be served—Notice, non-service of, effect of—Order of Revenue Officer, without jurisdiction, effect on Civil Court.*

No order for commutation of rent under section 40 of the Bengal Tenancy Act is to be made till notice of the application has been served. An order made without service of notice, is *ultra vires*.

An order under section 40 of the Bengal Tenancy Act, made by Revenue Officer without jurisdiction does not bind the civil Court. *Gora Chand Halder v. Rakhal Chandra Ghose*

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—, *demand for, if creates tenancy; See Ejectment*

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—, *right to, from putnidar, if can be assigned by Zemindar; See Putni* ...

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—, *suit for—Concurrent leases—Subsequent lease, nature of—Lease for agricultural purposes—No proof as to right to collect rent.*

The defendants in possession were burgadars, the plaintiff claiming the rent under oral settlement from the superior landlord. It was found as a fact that the relationship of landlord and tenant did not exist between him and the defendants, on the ground that there was no proof that the superior landlord had assigned to the plaintiff the right to collect rent from the defendants :

Held, that the suit for rent could not be maintained, though the superior landlord, who was impleaded as a party defendant to the suit, did not contest the plaintiffs' suit.

The oral settlement was not a lease of the proprietary right but a mere hiring out of the land and no privity of contract or of estate was created as between the plaintiff and the defendants.

It will introduce confusion into the administration by the Bengal Tenancy Act, if, when a holding is leased by the landlord for the purposes of cultivation first to one raiyat and then to another, the second raiyat is entitled to collect the rent payable by the first.

In England, the law as to concurrent leases, is curious and technical, and in some respects unsettled. *Sheikh Songsor Ali v. Jagannath Pal* ...

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—, *suit for, by purchaser of interest created between zemindar and putnidar under Putni Regulation—Purchaser's right, if can be questioned by putnidar; See Putni*

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Res judicata—Civil Procedure Code (Act V of 1908), Sec. 11 Expl. 1—'Former suit'—Suits tried jointly—One appeal against two decrees—No order for consolidation—Res judicata, rules of, if applicable to appeal.

Res judicata—(Contd.).

It is not the priority in the commencement of one action that renders the judgment obtained therein a bar to the recovery of a second judgment in another, but because the first judgment, when given, whether in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff in lieu thereof one of a higher nature.

The doctrine of res judicata is applicable to all the stages of a suit, till it is finally terminated and is not confined to Court of first instance; it applies equally to the procedure of the first and second appellate Courts.

A, B and C brought a suit against D for recovery of possession of certain land. A few days later, D and his brothers instituted against A, B and C a suit for establishment of their title to the homestead portion of the property involved in the first litigation. The relief in the first suit was valued at Rs. 348, and that in the second suit at Rs. 200. The two suits were tried jointly at the desire of the parties, as the disputed land and the causes of action were common to a certain extent. The first suit was dismissed, while the second was decreed. Thereupon, the plaintiffs in the first suit, who were the defendants in the second suit, preferred one appeal, which was directed against the decrees in both the suit and was valued at Rs 548. Copies of both the decrees were attached to the memorandum, which, however, set out the name of D alone as the respondent:

Held, that the appeal preferred to the lower appellate Court was defective in two respects, namely, first, that contrary to established procedure one appeal was preferred, without an order for consolidation by the Court against two distinct decrees in two separate suits; secondly, even treated as otherwise valid, the appeal was defective, in so far as it was intended to be an appeal in the second suit, in as much as some of the successful plaintiffs had not been joined as parties respondents.

That the decision of the question of title in the suit under appeal was barred by the decision in the subsequent suit between the same parties and others, which terminated earlier in a victory for the respondent. That decision could not be collaterally attacked or implicitly ignored in appeal. *Isup*

All v. Gour Chandra Deb 184

Res judicata, doctrine of, where applicable—Appellate Courts; *See* **Res judicata** 184

Restitution—Civil Procedure Code, (Act V of 1908), Sec. 144—Inherent jurisdiction—Setting aside of auction sale—Deposit of purchase money—Money distributed amongst creditors of judgment-debtor—Judgment-debtor, if to pay—Auction-purchaser clearing off charges on property—Interest.

It is the duty of the Court under section 144 of the Code of Civil Procedure to "place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed." This duty or jurisdiction does not arise merely under the section. It is

Restitution—(Contd.).

inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved.

A certain property was sold in execution of a decree. The purchase money was duly paid; the sale was confirmed and a sale certificate was given to the purchaser. The purchase money was distributed amongst creditors of the judgment-debtor who had attached the property. The auction purchaser paid off dues on certain bonds. This auction sale was afterwards set aside on appeal :

Held, that the judgment-debtor should be restored to the property after making good to the auction-purchaser the moneys which had been applied for his benefit viz, the moneys distributed amongst creditors of the judgment-debtor.

That the moneys paid for clearing off dues on bonds, were optional payment made without any order of the Court; that these payments could not be made a condition of restoration to the judgment-debtor.

The order of the Court was silent as regards interests on 'mesne profits' and 'deposit.'

Held, that the equities of the case would be met by disallowing interest in either case. *Jal Berham v. Kedar Nath Marwari*

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Restrictive covenant—Lease creating permanent, heritable and transforable tenure—Condition for transfer—Effect of non-fulfilment of condition—Transfer of Property Act, Secs 10, 12; See Lease...

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Revenue, arrear of—Sale of land—Auction-purchaser—Under-tenants—Ejectment suit—Exceptions to S. 37 of Act XI of 1859 and S. 12 of Bengal Act VII of 1868—Material issues—Findings—Duty of High Court.

A holding in Bengal was sold in auction under Bengal Act XI of 1859 for realisation of arrears of revenue and was purchased by the appellant. The respondents were under-tenants of lands in the holding at the time. In a suit for ejectment and mesne profits by the appellant, the respondents pleaded that there was no arrear of revenue to justify the sale and that they were protected by the exceptions to S. 12 of the Bengal Act VII of 1868.

Held, on the evidence that there was an arrear of revenue to justify the sale.

Held, also that the respondents were not protected by the exceptions to S. 12 of Bengal Act VII of 1868 nor by the exceptions to S. 37 of Act XI of 1859.

Duty of the High Courts to pronounce their opinion on all important issues in cases before them commented upon: *Mahomed Solaiman v. Kumar Birendra Chandra Singh*

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Revenue Sale Law, Sec. 37—Under-tenants—Suit for ejectment and mesne profits; See Revenue, arrear of

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Review, granting of—Erroneous order; See Appeal

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Revision—Appeal petition treated as revision—Civil Procedure Code (Act V of

Revision—(Contd.)

1908), *Sec. 115—Justice—Decree, amendment of—Condition not fulfilled—Application for extension of time—Preliminary decree.*

In the Court of first appeal the following order was passed: "The suit be decreed in part, the title of plaintiffs Nos. 2 to 7 be declared to 1 kani of plot No. 2 of the plaint and the plaintiffs 2 to 7 do remain in possession of the same. The parties [except the plaintiff No. (14)] do get costs in the lower Court in proportion to their success. But all this is dependent upon the plaintiffs Nos. 2 to 7, paying within one month from to-day, a further Court-fee of Rs. 65. Plaintiffs' appeal No. 34 is dismissed with costs, on condition that plaintiffs 2 to 7 do pay within one month from to-day a further Court fee of Rs. 65, in default of which appeal No. 34 will be allowed in full, that is the original suit will be dismissed with costs in both Courts to defendants." This order was made by A on the 20th February, 1918. On the 26th February the decree was signed by A. Plaintiffs Nos. 2 to 7 did not carry out the order of the Court within the time limited. On the 5th July 1920, an application was made on behalf of the plaintiffs Nos. 2 to 7 for permission to deposit in Court a further Court-fee of Rs. 65 as mentioned in the judgment dated the 20th February, 1918 and in the decree dated the 26th February, 1918. The matter came before B, another Judge. The further Court-fee was actually deposited in Court by the plaintiffs Nos. 2 to 7 on the 30th July, 1920, and thereupon B ordered that the decree (described as the final decree) should not be passed in this case. In accordance with this order a clause was inserted in the original decree which ran as follows: "In accordance with order No. 14 of the order sheet dated the 20th July, 1918 Court-fee of Rs. 65 having been paid, the decree is made final." Against this decree, the defendants appealed:

Held, that if there be no appeal against the decree, the appeal, under the circumstances of the case could be treated as a petition under section 115 of the Code of Civil Procedure; the circumstances being so extraordinary, that it would amount to a denial of justice if no relief be given to the defendants.

That the Court below exercised a jurisdiction in amending the decree.

That the decree which was drawn up on the 26th February, 1918, was itself a final decree, and the fact that it was drawn up before the expiration of one month from the 20th February, 1918, could not make it a preliminary decree. *Nawab Khajeh Habibulla v. Gola Asmoter Khatun* ...

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—*Calcutta Rent Act (III B. C. of 1920), Secs. 2 (f), 15, 18—'Fixing of standard rent'*

The decision of the rent Controller fixing the standard rent under section 2 (f) (ii) and not under section 15 of the Calcutta Rent Act, is open to revision.

The Calcutta Rent Act contemplates fixing of the standard rent by the Controller even in cases not coming under section 15; in other words, in cases coming under section 2 (f) of the Act.

Revision—(Contd.).

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The word 'fixing' in section 18 of the Calcutta Rent Act, is not limited to the case of settlement of the rent by the Controller. It is applicable not only to the cases specified in section 15, but also to cases coming under the first and second clauses of section 2 (f). *Asutosh Chatterjee v.*

Upendra Chandra Aich 101

Revision—Brevity of order—Omission to give reason; *See* Judgment ... 127

Sale, judicial, fraudulently procured, effect of—Purchaser not taking in good faith and with notice; *See* Execution sale 145

—by a co-sharer—Joint family—Subsequent division of property between Co-owners, accepted by all parties; *See* Hindu law—Joint family ... 73

—held without leave of Court, effect of—Receiver; *See* Mortgage ... 265

Sale of land—Agreement—Provision for prebparation of "Bargain paper" by *Vakil*—Construction—Specific performance of Contract.

Where a contract of sale of land contained all the necessary terms and provided that the bargain paper shall be prepared by a *Vakil*, the latter provision cannot be construed as a condition precedent and the purchaser is entitled to have specific performance of the contract.

Decree of the High Court affirmed. *Harichand Mancharam v. Govind Luxman Gokhale* 440

Saranjam Grant—Land or royal share of revenue—Presumption—Onus—Resumption by Government—Jurisdiction of Civil Court—Bombay Revenue Jurisdiction Act of 1876, S. 4.

A saranjam grant may be either of the soil and the whole revenue derived from it, or a grant of the royal share of the revenue only. There is no presumption that the grant is a grant of revenue only. The quality of the original grant must be determined on the facts in each case.

In the case of a Saranjam grant of the soil, the Government's right of resumption cannot be questioned in the Civil Courts. S. 4 of the Revenue jurisdiction (Bombay) Act of 1876 militates against such jurisdiction. *Secretary of State for India in council v. Laxmi bai* 464

—, grant, nature of, how determined; *See* Saranjam grant ... 464

Scheme—Modification of—Scheme for administration of charitable trust—Succession, rules for.

A Court which has sanctioned a scheme for the administration of a charitable trust, is competent from time to time, to vary the scheme as exigencies of the case may require.

A clause inserted in the original decree in a suit for removal of a trustee and for a settlement of a scheme for the management of the institution, ran as follows: "Liberty to any person interested from time to time to apply to the High Court for any modification of the schedule that may appear to be necessary or convenient":

Held, that the High Court was not competent to vary the rules for succession of high priest, which were determined in the original suit according.

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Scheme—(Contd.).	
to ancient usage. A variation in this respect could not be taken to be "a modification of the scheme that may appear to be necessary or convenient," within the meaning of the Clause. Hence an attempt of the petitioners, who were defendants in the original litigation, to have a rule inserted to the effect that certain persons were entitled to succeed to the office in certain events, must fail. Their omission to set up the contention now raised, operated as a bar. <i>Manadananda Jha v. Tarakananda Jha</i> 281	281
Second appeal—Civil Procedure Code, O. 41 R. 25, order under, if proper ;	
<i>See Appeal</i> 122	122
Second appeal—Misconstruction—'Jalkar' Evidence.	
A second appeal does not lie because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of it. The misconstruction of a document which is the foundation of the suit, which is in the nature of a contract or a document of title is allowed to be a ground for second appeal.	
The term 'Jalkar' is ambiguous. It may mean either a grant of a mere right of fishery or it may mean the grant of a sheet of water together with the sub-soil.	
The question whether what was intended to be granted in a particular case was restricted to a right of fishery or included a grant of a sheet of water together with the sub-soil, depends upon the construction of the original grant if available or is determined with regard to the subsequent history of the property. <i>Pran Krishna Tarapdar v. Prasanna Kumar Pakrasi</i> 580	580
—————Plea of defence of purchase for value without notice, if can be raised—Plea not specifically raised in pleadings or in issues ; <i>See Execution sale</i> 145	145
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“Ordinary law”—Male primogeniture Sanad—Evidence of instances of	
widows’ succession prior to Sanad—Crown Grants Act (XV of 1895) S. 3.	
In 1863, the estate of Mahal Tajpur was granted to an ancestor of the	
parties under a male primogeniture sanad. The estate was entered	
under List 4 prepared under section 8 of the Oudh Estates Act. Intes-	
tate succession to such estates in List 4 is to be regulated by the ordinary	
law applicable to the parties, under section 23 of the Act. On the death	
of the last holder in 1907, his widow took possession of the estate as her	
husband died intestate: the appellant sued for possession as the last	
holder’s heir under the primogeniture rule of succession:	
<i>Held</i> , (1) that the words “ordinary law” in section 23 have not the effect	
of displacing the rule of succession prescribed by the Sanad under which	
the estate is held; and (2) that, having regard to section 3 of the Crown	
Grants Act of 1895, evidence of widows’ succeeding prior to the Sanad	

Succession—(Contd.).

cannot be led to prove a custom contrary to the terms of the sanad.

Badri Narain Singh v. Harnath Kuar ... 306

— *Oudh Estates Act (I of 1869)—Widows and reversioner's rights—Expectancy—Transfer—Claim for money advanced on transfer—Agreements and contracts—Distinction—Contract Act (IX of 1872), Sec. 2, 65—Limitation.*

The last male holder of the estates of Paska and Lilar in Oudh died childless in 1873. His widows set up a will of their husband empowering them to adopt. The respondent Indar Bahadur Singh as the nearest reversioner instituted a suit against them and the Court of Wards, who had taken over the estates, and obtained a decree declaring the alleged will to be invalid and that he was entitled to succeed to Paska and Lilar on the death of the last surviving widow of the last male holder.

The husband of the plaintiff appellant advanced Rs. 20,000 to Indar Bahadur for this litigation and a further sum of Rs. 5,000 for other expenses and obtained an instrument of transfer on which the present suit is brought :

Held, that whatever the view that may once have prevailed, it is now established that under the Oudh Estate's Act the succession to collaterals opens on the death of the widow just as under the ordinary Hindu Law and that the transfer in question was void as being the transfer of an expectancy merely.

Held also, that under section 65 of the Contract Act the transferee was entitled to recover the sum advanced by him and that the claim was not barred by limitation as the agreement was not discovered by the appellant to be void till his demand for possession of the transferred property was resisted by the respondent, which was within three years of the present suit. **Thakurain Harnath Kuar v. Thakur Indar Bahadur Singh** ... 346

—, rules for—Scheme, modification of ; *See Scheme* ... 281

Suit, if maintainable—Bond taken by a commissioner in partition suit for work done, from a party—Commissioner, duty of.

A commissioner appointed by a Court must keep himself clear of any ambiguous conduct towards any party in the matter of his fees.

The work done by the commissioner for partition is the work done for that Court.

At a time when the commissioner was assisting the arbitrator appointed by parties in a partition suit, to discharge judicial duties as between one party to a partition suit and another, he was approaching the plaintiff from time to time and getting sums of money on account, and finally as a condition of submitting his report, he took from the plaintiff a mortgage bond for a fixed sum of money, which the plaintiff thereby promised to pay :

Held, that a suit on the bond was not maintainable.

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Suit—(Contd.).

That it was contrary to the duty of a commissioner ; that it was improper and illegal conduct.

That the Commissioner, if sufficient fees were not forthcoming, was entitled to go to the arbitrator, who was empowered by Court to appoint him, and to object to do the work without remuneration. *Pramatha Nath Sen v. Sheikh Abdul Aziz Meah* 406

— against tenure-holder for payment in one instalment, if maintainable—Collector erroneous order of—Jurisdiction ; *See* Embankment ... 585

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Summary enquiry—*Calcutta Rent Act (III B. C. of 1920), Sec. 20—Criminal Procedure Code (Act V of 1898), Sec. 5 (2), 29.*

The President of the Calcutta Improvement Tribunal is competent to hold summary enquiry referred to in section 20 of the Calcutta Rent Act under the provisions of chapter XXII of the Code of Criminal Procedure.

Having regard to the provisions of section 29 read with section 5 (2) of the Code of Criminal Procedure the possibility of the application of the provisions of the Code of Criminal Procedure to Courts which are not mentioned specifically in the Code of Criminal Procedure, is not excluded.

Ishau Chandra Sarkar v. Manmatha Nath Dutta 298

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Trial—Cognizance of case by different Magistrates.

<i>Per Newbould J.</i> The law prevents a person being tried twice for the same offence. But if cognizance is taken by two different Magistrates at different times, the trial can proceed before either of the Magistrates who have taken cognizance irrespective of the one having taken cognizance before or after the other. <i>Hari Satya Bisham v. King Emperor</i>	347
————, regular, if can be changed into summary one in the middle of trial; <i>See</i> Procedure	105
————, second— <i>Criminal Procedure Code (Act V of 1898), Sec. 403—Possession of several articles of stolen property—Acquittal on prosecution in respect of some—Prosecution, if can be had, for other articles—Different owners—Time.</i>	

A person was found in possession of several articles of stolen property. He was acquitted in respect of some of them for which he was prosecuted. The different articles were stolen from different persons but there was no evidence that they were received at different times :

<i>Held</i> , that he could not be tried in respect of other property found in his possession on the same date and a second trial was illegal under section 403 of the Code of Criminal Procedure. <i>Ganesh Sahu v. Emperor</i>	326
————, simultaneous— <i>Cross cases—Trial by different Magistrates—Transfer—Stay of proceeding.</i>	

There was a dispute regarding some land between two parties. A of one party complained before the Magistrate and summons was at once issued against B and others of the other party under section 147 I. P. C. On the next day, B lodged a counter case which was sent to the police for report and on police report C. and D. of A's party were summoned under section 323 I. P. C. The two cases were then made over to two different Magistrates for disposal. In A's case all the prosecution witnesses were examined and charge was framed against the accused under section 147 I. P. C. In the other case only one witness for the prosecution was examined :

<i>Held</i> , that both the cases should be tried by one Magistrate. That the trial of the case in which A was the complainant should be proceeded with and the proceedings in B's case should be stayed till the disposal of A's case. <i>Shelkh Samir v. Beni Madhab Gope</i>	410
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Trial, where to proceed—Cognizance of case by different Magistrates; *See*
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Trustee—Decree against executors—Unborn person—Shebait.

A died leaving two wives B and C, one son R by B and one son P by C.
 The defendants were the sons of R. P had a son W, who had a daughter L, whose sons were the plaintiff and the defendant K.

C died in 1841, having dedicated to the service of certain idols properties which were the subject of the present suit. By the instrument of dedication, she appointed her grandson W to be shebait and "mallik," W took out probate and possessed himself of the property left by C and died shortly thereafter, in 1842.

W left a will appointing executors. At the time of his death, his daughter L was only about a year old. By his will he directed his executor, *inter alia*, to see that the worship of the idols was carried out (as established by C) and said, "if male issue are born from the womb of my daughter such grandsons will upon attaining their ages take the whole of my property immovable and movable from my said executors but they shall in equality with my said executors only become the shebaits of the said Thakoorance and the other idols, and will in the aforesaid manner perform the duties of the *sheva* or service." The will was duly proved by the executors, who possessed themselves of W's estate, including the property dedicated by C. The executors did not act as shebaits, but allowed the sheba to be performed by W's step-mother S.

A suit was instituted on the 27th August 1846 against the executors of W, who were sued as executors of W and derivative executors of C, and the descendants of A, some of whom disputed the dedication by C and claimed to be entitled to the property. The matter was referred to the Master to inquire what property C died possessed of as *stridhan*, and what portion of her estate came into the hands of W or his executors, and who would be fit and proper person to appoint, to carry out the religious trusts of C's will.

On the 15th April, 1859, the Master reported that the present defendants (sons of R) were fit and proper persons. And on the 7th June, 1859, the Master's report was confirmed, and it was declared that the three defendants were fit and proper persons to execute and perform and keep up all the religious trusts in the will of C,—to receive the idols and jewels, and the balance of the rents and profits &c. And the receiver was ordered to pay the income of the property to the defendants during their natural lives or until the further order of the Court, to be by them applied in the performance of the trusts of the will of C, they undertaking to make the payments to the various persons mentioned in the decree.

The plaintiff was born on the 22nd January, 1859 and the defendant K was born on the 6th October, 1856.

The present suit was instituted for a declaration that the plaintiff and the defendant K were the persons entitled to be shebaits and trustees, and not the defendants, the sons of R:

Trustee—(Contd.).

PAGE.

Held, that L being a party to the former litigation, she and her son K were bound by the proceedings in the former litigation.

That as the plaintiff claimed under the will of W to be shebait &c, and entitled to execute the trusts of C's will, and that as he was not born at the time W died the sons of L took nothing under the will. *Gopal Lal*

<i>Seth v. Tariney Chand Bysack</i>	469
Trusts in favour of unborn person ; <i>See</i> Trustee	469
Ultra vires transaction, if can be validated by ratification ; <i>See</i> Lease ...	589
Unprofessional conduct— <i>Legal Practitioners Act (XVIII of 1879) Sec. 13 (b)</i> — <i>Prosecuting mooted drafting written statement for accused—Rule.</i>	

A legal practitioner cannot represent conflicting interests or undertake the discharge of inconsistent duties. When he has once been retained and received the confidence of a client, he cannot accept a retainer from or enter the service of those whose interest are adverse to his client in the same controversy or in matter so closely allied thereto as to be in effect a part thereof. The rule is rigid and is designed not alone to prevent the honest practitioner from fraudulent conduct, but as well to preclude the dishonest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights or the interests which he should alone represent.

Fidelity is required from all who hold fiduciary relations ; they must not lightly enter upon such relationship, but if they do they will not be permitted to be disloyal ; and of all species of disloyalty, desertion and adherence to the enemy or to the opposite party in a suit is recognised as the worst. <i>Emperor v. Rajani Kanta Ghose</i> , ...	48
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Voluntary payment— <i>De facto</i> shebait spending money ; <i>See</i> Maintenance ...	20
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———Landlord, right of, to eject—Rent, receipt of, due prior to forfeiture, subsequent to service of notice under section 49 (b) of the Bengal Tenancy Act ; <i>See</i> Ejectment	548
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Wakf— <i>Mahomedan Law—Family settlement based on invalid wakfs but in compromise of disputed claims—Validity—Annuities out of income of property—Charge—Mussulman Wakfs Validating Act (VI of 1913), effect of.</i>	
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The Mussulman Wakfs Validating Act of 1913 is not retrospective and cannot be construed as validating deeds executed before its date. Deeds which purported to create by gift a perpetual succession of interests for the aggrandisement of the family of the donor, were not valid under Mahomedan law and were not validated by the use of the term "Wakf" or by the insertion of a remote trust for the poor.

Agreements by way of compromise of a pending litigation fixing certain allowances to living and named persons to be continued to their heirs,

Wakf—(Contd.).

PAGE,

though based on invalid wakfs; are valid and enforceable. A direction to pay the allowances out of the income of the properties shows an intention to create a charge. <i>Khajeh Solehman Quadir v. Nawab Sir Sallmullah Bahadur</i>	56
—, invalid, agreement based on—Compromise of a pending litigation—Allowances to living and named persons to be continued to their heirs; <i>See Wakf</i>	56
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—, Hindu, when can alienate a small portion of her husband's property; <i>See Alienation</i>	383

Will—Construction—English rule—Period of distribution.

The rule of law is to ascertain the intention of the testator as declared by him, and apparent in the words of his will, and to give effect to this intention so far as, and, as nearly as may be, consistent with law.

In cases where a testator, in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *prima facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. The rule has no other effect than to attribute to the words used their natural and primary meaning, unless that meaning is displaced by the context.

A Parsi Will will not be construed in the light of rules of construction which have been applied in English decisions. <i>Dinbal v. K. B Nusservanji Rustomji</i>	420
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Will—Construction of—Letters of administration—Mortgage by executor—mortgage suit against administratrix—Representatives of testatrix not brought on record—Auction-purchaser, title of.

By her will dated the 16th March 1872, S. directed her sons J and N, who were made trustees to make proper arrangements for managing and preserving her properties &c. and the balance of the profits after defraying certain expenses should be appropriated and enjoyed by J and N during their lifetime. The will further provided that on the death of J and N, the son or sons born of their loins who might be alive should be equally and fully entitled to the properties and should possess and enjoy the same. The will further provided that none of the properties should be sold for the son's debts and that they should not be entitled to transfer the same in any way by gift, sale &c but that if the income of the estate was insufficient to pay the Government revenue, the sons would be entitled to pay the same by mortgaging the properties.

On the 15th July 1884 J died childless. On the 17th September 1886 probate of the will of S was granted to N who on the 3rd May 1889 executed a mortgage to secure sums previously borrowed to pay Government

Will—(Contd.).

PAGE.

revenue and sums then borrowed for the same purpose. N died intestate on the 9th June 1891 and on the 10th December 1891 letters of administration of his estate were granted to his daughter.

The plaintiff is the son of S's daughter. On the 3rd December 1915, the plaintiffs filed a suit to recover possession of an eight annas share of certain properties. His claim was resisted on the ground that these properties were included with other properties in a mortgage executed on the 3rd May 1889, in respect of which the mortgagee obtained a decree on the 19th September, 1892 under which he brought the mortgaged properties to sale on the 28th April 1893, two of the properties in suit being purchased at the sale by defendants Nos. 1 to 7 and two by M who subsequently conveyed these to the defendants :

Held, that J and N took only life interest; that as J and N had no sons, there was an intestacy after N's death. On N's death the plaintiff became entitled to the estate.

That as the mortgage suit was against N's administratrix and as no representative of S was brought on the record, the defendant acquired no title against the plaintiff.

A contention was raised in the appellate Court that inasmuch as the estate had had the benefit of the mortgage, the plaintiff was bound to redeem the mortgage :

Held, that as this contention involved other considerations, it should not be given effect to. *Gurudas Kundu Chowdhury v. Kamal Kumar Dutt* ...

Will, construction of—Intention; *See* Will ... 90

—, construction of—Life estate—Intestacy; *See* Will ... 430

—, construction of—Period of distribution—Gift to a class; *See* Will ... 90

Witness.—*Evidence, Act (I of 1872), Sec. 154—Hostile witness—Telling different story—Evidence of hostile witness, if can be believed in part—Court witness—Criminal Procedure Code (Act V of 1898), Sec. 540.*

The mere fact that at a sessions trial a witness for the prosecution tells a different story from that recorded by the Sub-Inspector after the occurrence, does not necessarily make him hostile.

When a witness is cross-examined by the party calling him, his evidence cannot be believed in part and disbelieved in part but is to be rejected in toto.

The provisions of section 40 of the Code of Criminal Procedure are very wide. The Judge may summon witnesses to the box, and if the public prosecutor declines to examine them, may thereupon acting on his own initiative cause them to be produced. Such witnesses may thereupon be regarded as called under that section. *Emperor v. Satyendra Kumar Dutt Chowdhury* ...

—hostile, evidence of, if can be believed in part; *See* Witness ... 173

Witnesses—*Examination of—Argument heard—Criminal Procedure Code (Act V of 1898), Sec. 540.*

Witnesses—(Contd.).

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After both sides had closed their respective cases, after arguments had been heard and a date had been fixed for delivery of judgment in a protracted hearing of the case, two witnesses who were named by the prosecution, were examined before the Magistrate—the Magistrate having exercised his powers under section 540 of the Code of Criminal Procedure :

Held, that the procedure adopted by the Magistrate was entirely unjustifiable. *Natabar Ghose v. Adya Nath Biswas* 415

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ERRATA

Page 281 margin for " 1925 " read " 1923 "

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THE RULE AGAINST HEARSAY AND THE INDIAN EVIDENCE ACT.

Introduction.

The object of this brief essay is to give the readers a glimpse into the extension of English law in India. As religion and law are very closely connected in eastern countries even up to the present day, codification has not made much progress with regard to substantive law in India. With regard to procedure, however, we have now got the same law throughout the whole of British India. Writing about the working of the codes of law enacted by the British Government in India, Mr. Bryce says that it "conveys either warning or encouragement to England herself" (*Studies in History and Jurisprudence on The Extension of Roman and English Law Throughout The World*). The problem of codification is one affecting every country; and hence the present topic is expected to be of some interest to all students of law.

We shall take up in this essay only one of the rules of evidence and see how it has been affected by codification in India. The Indian Evidence Act was drafted by Sir J. F. Stephen and passed into law in 1872. His Introduction to the Act, entitled "The Principles of Judicial Evidence" contains according to Prof. Wigmore a brief but "thoroughly scientific survey of the subject" (*Principles of Judicial Proof*, p. 2, footnote). The Indian Evidence Act agrees with this "Introduction" except in places where the language of the Act had to be changed in accordance with the criticism which it evoked. It will therefore be necessary to refer to this "Introduction" to explain the Act. When Mr. Bryce travelled in India in 1888-9 he gathered the following opinion about this Act, "Much of it was condemned as being too metaphysical, yet deficient in subtlety. Much was deemed superfluous, and because superfluous possibly perplexing." The object of this essay is to point out some of these perplexing problems to which the Act has given rise. Mr. Stephen's complaint against the English law of evidence is that it

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lacks arrangement, clearness, and precision, and he refers to some of its rules, one among them being that hearsay is not to be admitted. We shall try to show how he has "maimed, mangled and mutilated" the rule in attempting to free it from vagueness and ambiguity. The readers will see why "his capacity for the work of drafting was deemed not equal to his fondness for it" (Bryce). We may mention here that in drafting the Act he went wholly against the suggestions of the Commissioners, appointed by Her Majesty to prepare a code for India, in respect of some important points.

Students of law are familiar with the criticisms that are, at times, offered against the rule against hearsay by eminent thinkers. One celebrated American writer has gone so far as to characterise it as "an anomaly of the English law". (cf. Chamberlayne). Russel, L. C. J., said in *Atkinson v. Morris*, 1896, P. D. 40, in rejecting the declaration of a testatrix, after the execution of the will, that she had executed it in duplicate, "It is to be observed that the rules of evidence which prevail in this country are much less liberal and wide than those which prevail in many other enlightened countries and that our rules of evidence shut out large bodies of testimony which are received and, I confess for myself, I think are properly received in other countries—evidence of great cogency and probative force". Herschell L. C. said in *Woodward v. Goulstone* (1886), 11 A. C. 469, in rejecting a similar piece of evidence, "No doubt there are many countries, and Scotland is one of them, where the law permits declarations of persons who are dead to be given in evidence, in all cases where they are made under circumstances in which such evidence ought properly to have been admitted if the person had been living; and there is much to be said for that law as compared with our own." My object in referring to these remarks is this that on account of some omissions and ambiguities, the Indian Evidence Act seems in this respect, on a proper construction, to differ from the English law.

As it is not possible to understand the subject of our discussion without bearing in mind the frame-work of the entire Act, a very brief outline is given in section I.

Sec. I. The Framework of the Indian Evidence Act.

Mr. Stephen complains in p. 2 of his "Introduction" that the English law of evidence has not attempted to deal with the main principles of the subject, namely, that of *relevancy*. The most important question, says Mr. Stephen, is "what facts are relevant?" Accordingly in part I of the Act he proceeds to lay down an exhaustive

list of rules of relevancy in sections 5-16. Stephen says in pp. 72-73 of his "Introduction" that the sections relating to relevancy are by far the most important, "as they are the most original part of the Evidence Act, as they affirm positively what facts may be proved, whereas the English law assumes this to be known, and merely declares negatively that certain facts shall not be proved." "These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings. These are designedly worded very widely, and in such a way as to overlap each other" (Introduction p. 72). Facts which form part of the same transaction with a fact in issue (section 6) or are the occasion, cause or effect, immediate or otherwise of facts in issue or relevant facts (section 7) or which show or constitute motive or preparation for any fact in issue or relevant fact (section 8) or which are necessary to explain or introduce a fact in issue or relevant fact (section 9) and facts which make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable—are relevant facts. Section 5 says that evidence may be given of facts in issue or relevant facts only and of no others and evidence is defined in section 3 as meaning and including statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry and documents produced for the inspection of the Court.

In page 164 of his Introduction he says, "the concluding part of the chapter on the relevancy of facts enumerates the exceptions which are to be made as to the general rules as to irrelevancy. The rules as to admission, statements made by persons who cannot be called as witnesses, and statements made under circumstances, which in themselves afford a guarantee for their truth, are an exception to the exclusion of statements as proof of the matter stated." Sections 17-31 deal with admissions of which confession (sections 24-30) is a species and sections 32-39 deal with statements by persons who cannot be called as witnesses and some statements under special circumstances. The remaining sections in part I which is devoted to *relevancy* deal with judgments, opinion and character.

Part II deals with instruments of evidence. Sections 59-60 deal with oral evidence and the remaining sections with documentary evidence.

Part III deals with production and effect of evidence. Sections 115-117 deal with estoppel; sections 118-166 deal with witnesses (their qualifications, privileges, examination etc.) and section 167

deals with the effect of improper admission and rejection of evidence.

To deal with the rule against hearsay it will be necessary to remember carefully the provisions of Part I and section 60 in Part II.

To prevent any misapprehension we should state here briefly what we mean by the rule against hearsay. Only a very small part of the materials on which the conviction of the Court is based can be placed before the senses of the Court (e. g. local inspection, view of weapons of offence, demeanour of witness, offences committed in the presence of the Court, namely, contempt of Court etc.). The Court has to depend largely on inferences which may be either (i) from statements to facts stated or (ii) from facts believed to exist to other facts (Cf. Stephen's Introduction, p. 50). The rule against hearsay relates to inference from statements to facts stated. The two main elements into which this rule may be analysed are :—(a) that a statement in order to prove the facts stated must be based on the personal observation of the person making the statement ; and (b) that a statement to be admissible for the purpose of proving the facts stated must be made in Court by a witness whilst subject to examination. Prof. Wigmore restricts the meaning of the rule against hearsay to (b) only and makes (a) to be a separate rule about testimonial qualification. In English law the rule is sometimes used so as to include many other elements and so we need not carry the analysis so far as Mr. Wigmore has done, though that would have simplified our work very much.

According to the majority of the commentators, section 60 embodies the rule against hearsay [though there are some who have pointed out the inadequacy of this view Cf. Mr. Justice Markby]. We shall accordingly proceed to see, first, how far section 60 embodies the rule against hearsay.

Section II. Sec. 60 and the rule against hearsay.

Amir Ali and Woodroffe JJ. say in their commentary on section 60 (The Law of Evidence applicable to British India, p. 464) that section 60 enacts the rule against hearsay.

Section 60 runs thus :—

Oral evidence must, in all cases whatever, be directed ; that is to say : if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it ; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it ; etc. etc.

Section 60 relates only to oral evidence and not to documents which, as defined in section 3, include written statements. The rules with regard to this class of instruments of evidence is contained in sections 61-68. There are two sections among these which lay down exclusionary rules, namely, section 64 requiring the production of a document to prove its contents and section 68 requiring the production of at least one of the attesting witnesses to prove a document required by law to be attested (each of these rules is subject to a number of exceptions). The English rule against hearsay extends to the most solemn document about the execution of which there is not the slightest doubt, namely, sworn statements in judicial proceedings, sealed documents, affidavits and the like ; and of the numerous exceptions to the rule against hearsay, only in a few cases is any special indulgence shown to written statements ; where the reasons for recognising the exceptions are present, namely, necessity for having the evidence and circumstantial guarantee of trustworthiness, even oral statements are freely admitted.

It cannot be argued that a statute should not be so construed as to evade the statute and that, therefore, section 60 should be so construed as to apply to written statements for then the position of section 60 should be altered somewhere else and it should not be placed under the heading, " oral evidence".

Even as to oral statements in Courts, section 60 does not make any distinction between an ordinary fact and a statement which is a very peculiar kind of fact, namely, a fact whose existence involves another fact or facts, namely, the facts stated ; and in connection with statements, section 60 does not distinguish between the purposes for which evidence of a statement may be given, namely, to prove the making of the statement or to prove the facts stated. The effect of this failure to distinguish between the purposes for which evidence may be given of a statement is to authorise the introduction of evidence of a statement to prove the facts stated and thus to frustrate one of the main, if not the sole, aims of the rule against hearsay. Mr. Justice Markby brought out this defect of section 60 in his notes on the Indian Evidence Act and Amir Ali and Wodroffe J.J. quote his view without any dissent or even comment in p 466 of their commentary (throughout this celebrated commentary runs a clear opposition between these authors' own view and that traditionally adopted). In p. 466 of their commentary, in a footnote, appears thus :—"In his notes on this Act Markby, J. says that the first four paragraphs of this section have been supposed to have been intended to exclude that kind of evidence which is called

hearsay but that for the reasons that he states it is difficult to believe this, and moreover hearsay would not be excluded by the language here used. For statements are facts and are so treated in sections 17, 32. If, therefore, A, a witness, had been told something by B and A were asked what B had told him, the evidence of A would refer to a fact which could be heard, and A is a witness who says he heard it; this section would, therefore, not exclude it. He states that the following universally recognised rule has been in fact omitted from the Act, viz. "No statement as to the existence or non-existence of a fact which is being enquired into made otherwise than by a witness whilst under examination in Court can be used as evidence." Markby, Evidence, 52, 53, 19."

In order to be "direct" under section 60, when the oral evidence refers to a fact which could be seen, or heard etc., it must be evidence of a witness who says he saw or heard it. It is doubtful whether the last "it" in the various explanatory paragraphs refers to the fact immediately deposed to, or the fact ultimately intended to be proved; if it refers to the fact immediately deposed to, evidence of statements by third persons will be freely admitted without any restriction; and if it refers to the fact which the evidence is ultimately intended to prove, the effect would be to exclude circumstantial evidence of things which could be seen, heard and felt. Mr. Justice Markby says about this *it*, "This last 'it' is somewhat indefinite; but I think that this 'it' has reference to the fact previously spoken of; and I think the fact previously spoken of is the fact deposed to, and therefore not always the fact which it is ultimately intended by this section to exclude circumstantial evidence of things which could be seen, heard and felt, though the wording of the section is undoubtedly ambiguous and at first sight might appear to have that meaning." (*Neel Kanto v. Juggo* 1874, 12 B. L. R. App. 18, 19).

The same conclusion may be arrived at in a different way. Section 60 does not apply to statements made out of Court; these statements are facts as defined in the Act, and whether evidence can be given of them depends on whether they are relevant. Section 60 applies only to a witness deposing in Court. Oral evidence means statements which the Court permits or requires to be made before it by witness in relation to matters of fact under enquiry, (section 3). It cannot be argued that as section 60 requires personal knowledge of witnesses as to facts deposed to in Court, it requires by implication personal knowledge of the maker of any statement wherever made,

if such a statement is submitted before the Court for then the position of section 60 would have to be altered to the chapter relating to relevancy. The fact that rules as to admissibility of statements made out of Court are laid down in the chapter relating to relevancy *i. e.* much earlier than section 60 (*e.g.* sections 32, 33 etc.) is all but conclusive on this point. If any doubt still lingers we may refer to the fact that while Mr. Stephen meets the argument that section 11 may admit such statements, he does not at all refer to section 60 (page 160 of his Introduction).

That it was not the intention of Mr. Stephen to exclude evidence of statements made by persons not in Court but simply to insist on personal knowledge of a witness as to facts deposed to, will appear from what he says about the different meanings of the rule in page 5 of his Introduction. He says if the rule means, "No witness shall ever be allowed to depose anything which he has heard said by any one else", the result would be "that no verbal contract could ever be proved, and that no one could ever be convicted of using threats with intent to extort money, or of defamation by words spoken, except in virtue of exceptions which stultify this rule." This remark of Mr. Stephen shows that he did not distinguish between statements which were parts of the issue, statements used circumstantially from statements used testimonially (*i.e.* to prove the facts stated); the failure to distinguish between the various purposes for which a statement may be used led him not to teach what, according to Prof. Wigmore, is the rule against hearsay; he confined himself solely to testimonial qualification of a witness on the stand. He goes on to say, "Most of the exceptions indicate that the meaning of the word hearsay is that which a person reports on the information of some one else, and not upon the evidence of his own senses. This with certain exceptions, is no doubt a valuable rule, but it is not the natural meaning of the word, hearsay is no evidence; and it is in practice almost impossible to divest words of their natural meaning. In section 60 he intends to reproduce this sense of the rule with different words for reasons stated here.

To sum up:—Section 60 does not exclude statements made *out* of Court, even though offered as proof of the facts stated; as to statements made *in* Court, it does not exclude written ones, and as to oral statements in Court it refers only to the first link in the chain of argument *i.e.* the fact which is immediately deposed to (which may be statement, oral or written).

We have seen before that in his Introduction Mr. Stephen speaks

about some general rules of irrelevancy of which one is that statements made out of Court are inadmissible as proof of the matters stated. We shall next discuss how Mr. Stephen proves this general rule of irrelevancy in his Introduction and see how far the language of the Act bears out his view on the subject as expressed in the Introduction.

(To be continued).

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THE RULE AGAINST HEARSAY AND THE INDIAN EVIDENCE ACT. (*Continued.*)

Section III. Mr. Stephen's Introduction and the rule against hearsay.

From the rule that a statement in order to be admissible for the purpose of proving the facts stated must be made in Court by a witness subject to examination, it follows that statements made out of Court are inadmissible for the purpose of proving the facts stated. According to Prof. Wigmore, as we have seen before, the principal object of the rule against hearsay is to forbid the use of such statements as proof of the fact stated as such statements are not tested by cross-examination. With regard to what Prof. Wigmore calls testimonial qualification, Mr. Stephen relies on section 60 but with regard to the use of statements made out of Court he seems to rely on the effect of sections 5-11. In page 159 of his Introduction he begins a discussion as to some classes of irrelevant facts which look like relevant ones and one of them consists of statements as to facts made by persons not called as witnesses. He does not even refer to section 60. He says that these facts are not relevant under sections 6-11, both inclusive. The second paragraph of section 11 admits evidence of facts which make the existence or non-existence of a fact in issue or a relevant fact highly probable or improbable. In page 160 of his Introduction, he says, "It may possibly be argued that the effect of the second paragraph of section 11 would be to admit the proof of such facts as these. It may, for instance, be said: A (not called as a witness) was heard to declare that he had seen B commit a crime. This makes it highly probable that B did commit that crime. Therefore A's declaration is a relevant fact under section 11. This was not the intention of the section, as is shown by the elaborate provisions contained in the following part of the Chapter II (sections 32-39) as to particular classes of statements, which are regarded as relevant facts either because the circumstances under which they are made invest them with importance, or because no better evidence can be got. The sort of facts which this section was intended to include are those which either exclude or imply

more or less distinctly the existence of the facts sought to be proved. Some degree of latitude was designedly left in the wording of the section (in compliance with a suggestion from the Madras Government) on account of the variety of matters to which it might apply. The meaning of the section would have been more fully expressed if words to the following effect had been added to it:—

“No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act.”

The reason why statements as to facts made by persons not called as witnesses are excluded, except in some specified cases (see sections 17-39), are various. In the first place it is matter of common experience that statements in common conversation are made so lightly, and are so liable to be misunderstood or misrepresented, that they cannot be depended upon for any important purpose unless they are made under special circumstances.

It may be said that this is an objection to the weight of such statements and not to their relevancy, and there is some degree of truth in this remark.

In the first place it must be noted that in the illustration cited A's statement must be proved by either oral or documentary evidence as A is not called as a witness and yet nothing is said as to this and hence the force of Mr. Justice Markby's argument that there is nothing in section 60 against the admissibility of statements made out of Court, is admitted by implication.

In the second place Mr. Stephen frankly admits that the objection is to the weight and not to the relevancy. That hearsay is open to suspicion requires no comment and a party's relying on hearsay may be said to raise a strong presumption against such a party in all systems of law. The unconditional rejection (subject to some exception) is a peculiarity of English law. This peculiarity has in some cases been adversely commented on by some celebrated thinkers. Even in England this rule of unconditional rejection is of recent origin, originally, as Prof. Thayer has very ably pointed out in his Preliminary Treatise on Evidence that the jurors were men possessed of personal knowledge of the facts under enquiry and the position of witnesses was of no great importance; that on account of gradual differentiation of functions, the jurors became purely *judges* whereas witnesses became required only to depose to facts falling under their senses (*ib. p. 498*). The maxim that only the best evidence may be given allied itself with this notion about the

function of a witness and gave rise to the rule against hearsay. There was no such rule of unconditional rejection in Rome where it was a matter for comment by counsel; Cicero in a case finds it necessary to warn the jury not to accept a statement as proving a fact because a witness says that he heard so (See S. Davidson—Problems of Roman Criminal Law—Ch. XVIII—Procedure in trial before jury). There is no such rule in systems of law not based on Common law; one writer in America where the rule is recognised brands it as an anomaly of English law. The question before us is,—Does the Indian Evidence Act recognise such a rule of unconditional rejection of statements by persons not called as witnesses, offered as proof of the facts stated? In order to answer this question properly, the distinction between (i) inference from a statement to facts stated and (ii) inference from a fact believed to exist to other facts, should be borne in mind. In pp. 54-6 of his Introduction, Mr. Stephen says that the process of inference from assertion (statement) to matter asserted (stated) cannot be affected by rules of evidence (p. 55) and that experience is the only guide on the subject (p. 57). He says, "upon the whole it must be admitted that little that is really serviceable, can be said upon the inference from an assertion to the truth of the matter asserted. The observations of which the matter admits are either generalities too vague to be of much practical use, or they are so narrow and special that they can be learnt only by personal observations and practical experience. Such observations are seldom, if ever, thrown by those who make them into the form of express propositions. Indeed for obvious reasons, it would be impossible to do so. The most acute observer would never be able to catalogue the tones of voice, the passing shades of expression or the unconscious gestures which he had learnt to associate with falsehood" (ib. pp. 57-8). It may be argued accordingly that secs. 6-11 of the Act, therefore, are not intended to deal with this kind of inference. That statements have, under some circumstances, a tendency to prove the facts stated, cannot be denied by any one; oral evidence is based on recognition of this tendency; oral evidence differs from other statements in being made *in Court* by a witness whilst *under examination*; but this circumstance, namely, being made in Court whilst under examination may serve as a test, a measure for the probative tendency but cannot create it where it does not exist; or, at most, it may be said to increase the weight but certainly it cannot be said to create it. Hence as the Act impliedly recognises this tendency of statements to prove the facts stated, it may be argued that sections 6-16 do not apply to this kind of inference and that

the only rule of exclusion is that contained in section 6c which applies only to statements made in Court ; and that therefore the discretion of the Court is not fettered by any rule in the Act. The answer will be that section 5 admits evidence only of facts in issue and relevant facts and that a statement made out of Court is a fact and, therefore, it must be a fact in issue or relevant (as defined in the sections of the Act, relating to relevancy) before it can be proved i. e. evidence may be given of it. A fact as defined in section 3 includes a statement ; in several sections of the Act, statements are expressly said to be facts e. g. section 32(8) (there is an explanation), section 14 (Cf. ill. i & m) etc. ; in the Introduction (p. 159) Mr. Stephen speaks of statements made by persons not called as witnesses as *irrelevant facts* ; in proving the irrelevancy of *these facts*, he meets the argument that may come in under sec. 11 by referring to the intention expressed in section 32 etc. ; he clearly admits that they are facts and that the notions of relevancy and irrelevancy are applicable to them. Statements are peculiar kinds of facts ; they are statements of facts i. e. *facts of facts* ; this peculiar kind of involution distinguishes them from other facts ; they are also for this reason *instruments* of proof ; the sources of error in drawing inferences from statements to facts are different from those in drawing inferences from facts to facts. Mr. Phipson has strongly criticised the application of the same term, relevancy, to indicate both these kinds of inference. Mr. Phipson says, "Some writers consider hearsay evidence to be excluded on the ground of irrelevancy. This view, however, ignores the circumstance that though a statement is a fact, it is one of a peculiar nature, being itself the statement of a fact, and that the relevancy of such fact is governed by the same rules, whether it be stated on oath or not. Such statement, then, being one which, if made by a witness, would be perfectly relevant is when not so made excluded because it is wanting in the sanction and the tests which apply to sworn testimony and admitted only when, in respect of the persons making it, or of the circumstances under which it was made, there is some security for its accuracy, which counterbalances the absence of those safeguards. The doubt and suspicion attending it are a doubt and suspicion attaching to its accuracy and are wholly distinct from the reasons which exclude facts as not tending to prove the matters in issue and are based on logical inference. The rule of exclusion then being a different rule and founded on different reasons, subject to exceptions which are related to the reason of that rule and not to the reason of the rules as to relevancy, it is only by an arbitrary use of the word "relevant" that

the two classes of evidence can be included in the same category."

Whatever objection we may have against the phraseology, there cannot be any doubt for reasons stated in the last paragraph that the probative tendency of statements come under sections 5-16 of the Act; hence, in order to answer the question, whether the Indian Evidence Act intends the unconditional rejection of statements made out of Court, for the purpose of proving the facts stated we have to consider the scope of sections 6-11. In order to prove that these are not admissible he takes the simplest type of such statements; he does not seem to have had in his mind "hard cases" which are said to make bad law; but he has not laid down any specific rule of exclusion and therefore a case must be decided with the help of sections 6-11 and the other sections in the Act relating to statements made out of Court.

In p. 160 of his Introduction Mr. Stephen says, as we have seen already, about section 11, "The sort of facts which the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved." This seems to show that though the effect of section 11 might be to exclude *generally* statements made out of Court, it is not to exclude them *all* unconditionally; but to subject them to *strict condition precedent*, namely possession of a high degree of probative force. Here comes a curious turn in his argument which requires no comment. He admits that the language of section 11 is wider than he intended it to be and he says that the present form of the section is due to a suggestion from the Madras Government and he suggests a proviso which tends to make the rule against hearsay a sort of corollary to the rules of relevancy; though section 11 will exclude most of the statements made out of Court, not specially admitted by any other section, Mr. Stephen's language here is such as to suggest that he thought that the rules of relevancy will exclude *all* such statement except those which were specifically admitted by some other sections. The section begins thus—Facts *not otherwise* relevant etc. and the proviso *suggested by Mr. Stephen* but *not enacted* says that section 11 shall not make any statement relevant which is not relevant under some other section of the Act: (The conflict between the intention of the Act and the intention of Mr. Stephen which runs throughout the commentary of Amir Ali and Woodroffe appears in the footnote in p. 155 of their treatise. The authors or at any rate their editor points out, "It is to be observed, however that the section says, 'Facts *not otherwise* relevant, i. e. under sections

6-10, 12 and subsequent sections, are relevant etc., while commenting on the proviso suggested by Mr. Stephen). On account of such remarks of Mr. Stephen, there is a good deal of divergence of opinion as regards the scope of section 11 (and section 7 which also is very wide in appearance). Hence we shall try next to construe section 11 in accordance with the general principles of construction. It may be noted here that in p. 72 of the Introduction Mr. Stephen says "Facts relevant under section 11 would, *in most cases*, be relevant under other sections."

It is nowadays an accepted principle of construction that evidence is freely allowable of all the circumstances which throw light on the statutes to be interpreted ; and the technical rules for exclusion of extrinsic evidence have lost their weight. As regards the admissibility of the history of an enactment the decisions, though of a somewhat conflicting nature, agree in this that they cannot override the plain meaning of the statute (see Maxwell—Interpretation of Statutes, 6th edition pp. 48-53). Chief Justice Hengham remarked in a case that he knew the meaning of a statute better than counsel as he had drawn up the statute, so also Lord Nottingham, in interpreting the Statute of Frauds, said that he had some reason to know its meaning as the Statute had its first rise from him. Lord Halsbury, however, remarked in *Hilder v. Dexter*, 1902, 71 L.J. Ch. 781, at p. 783, that the worst person to construe a statute is the person who is responsible for its drafting, for he is much disposed to confuse what he intended to do with the effect of the language which in fact he has employed. So far as section 11 is concerned there is no room for discussion as Mr. Stephen plainly admits that the language is wider than he intended. The difference was therefore intentional and not accidental ; and there cannot be the slightest doubt in principle as to the effect of Mr. Stephen's own intention on the effect of the language of the statute. Mr. Stephen in his Introduction invites us to treat section 11 as superfluous as he drafted it under *undue pressure* i.e. he claims the function of the legislature ; he forgets that he was but only one of the members of the legislature and not the legislature itself. The rule laid down in several cases that it is "a very serious matter to hold that when the main object of a statute is clear it shall be reduced to a nullity by the draftsman's unskillfulness or ignorance of law" (*Salmon v. Duncombe*. 1886, 11 App. Cas., at p. 634 ; *Rex v. Vasey*, 1905, 75 L.J.K.B. 117 etc.) does not apply here as it is not a case of an error in draftsmanship, but an intentional departure from the personal wishes of Mr.

Stephen. Mr. Stephen attempts to lay down an exhaustive list, of positive rules of relevancy. The definition of relevancy given in the second paragraph of the 11th section is able to take the place of all the other positive rules about relevancy. There is a wide divergence of opinion as to the scope of section 11 (and section 7). In p. 72 of his Introduction Mr. Stephen says that sections 6-11 "enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceeding." This seems to show that he did not intend to lay down positive rules for *all* possible cases but only for cases which *most frequently* occur in judicial proceedings. The tendency to pass from *most cases* to *all cases* so as to give the rules the appearance of demonstrative (deductive) truths shows Mr. Stephen's fondness for metaphysical subtlety in preference to concrete, actual experience. For these various reasons, very different views have been taken of section 11. Mr. Whitley Stokes, a commentator on the Indian Code, says that "two of these sections are so drawn as to permit evidence of matter wholly irrelevant"; Mr. Cunningham in his commentary on the Act laments by saying about section 11, "If an improperly wide scope be given to the section, the latter might seem to contain in itself and to supersede all the other provisions of the Act as to relevancy". On the other hand we find Mr. Justice Jardine, citing Mitter and Field JJ. saying, "Under the Indian Evidence Act, admissibility is the rule and exclusion the exception and the circumstances which under other systems might operate to exclude, are, under the Act, to be taken into consideration only in judging the value to be allowed to evidence when admitted." (*R v. Mona Puna*, I. L. R. 16 Bombay Series, 661, 668). Though this case relates only to the *competency* of a person (arrested and discharged) to be a witness, yet the remark is of general application; there are also decisions to the effect that in cases of doubt, a Judge should decide in favour of admissibility.

The bearing of this discussion as to the scope of section 11 on the present subject is this—that Mr. Stephen wanted to put all rules of evidence as much as possible into terms of relevancy and thought he could, in this way, to do away with the rules of exclusion (e. g. rule against hearsay etc.); and the effect of the *inclusion* of section 11 and the *omission* of the rule against hearsay is to make Indian law wider than English law and similar, in this respect, to the continental systems of law.

The difference between English law and Indian law on this point comes to this—that whereas in English all probative materials are

admissible unless positively excluded by some specific rule of exclusion, in India probative materials are admissible only when they come in under some specific rule one of which admits all materials which possess a *high* degree of probative force ; Indian law as to admissibility of evidence will thus appear, in some respects, to be stricter than English law as it requires, in cases not specifically provided for, a *high degree* of probative force and thus leaves the question of admissibility, in doubtful cases, to the discretion of the Court ; whereas in some other respects, it will appear to be more liberal as some of the exclusionary rules, namely, the rule against hearsay (so far as it *unconditionally* rejects all statements made out of Court offered as proof of the facts stated, subject to some well recognised exceptions) is not recognised by the Act.

We have so long been one with Mr. Justice Markby in our remarks about the Indian Evidence Act, that there is no express provision in it, co extensive with the rule against hearsay. We shall next pass on to Mr. Justice Markby's suggestion that the chapter on relevancy in the Act is unintelligible without the assumption of a rule excluding statements made out of Court offered as proof of the facts stated. Has not such a rule been enacted by implication ? We next proceed to discuss the theory which says "yes."

(To be continued).

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Dacca

THE CALCUTTA LAW JOURNAL

SHORT NOTE

PRIVY COUNCIL.

PRESENT : *Lord Buckmaster, Sir John Edge, Sir Lawrence Jenkins
and Lord Salveson.*

Monday, 23rd October, 1922.

SHIBA PRASAD SINGH.

v.

RANI PRAYAG KUMARI DEBI AND OTHERS.*

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Mr. W. H. Upjohn, K.C., Mr. Leslie De Gruyther, K.C., Mr. A. M. Dunne, K.C., and Mr. Kenworthy Brown, instructed by Messrs. Pugh and Co. for the Appellant.

Sir George Lowndes, K.C., Mr. E. B. Raikes, Mr. B. Dube and Mr. T. Ameer Ali, instructed by Messrs. W. W. Box and Co. for the Respondent.

Mr. Upjohn :—If your Lordships please. This is an appeal by special leave of the High Court at Calcutta from an order made by Mr. Justice Mookerjee and Mr. Justice Cuming pending an appeal from the Subordinate Judge to the High Court in their appellate Jurisdiction, the effect of which according to our view is this. I am appearing for the defendant in the action.

Lord Buckmaster :—This is an appeal in an inter-locutory proceeding.

Mr. Upjohn :—Yes, my Lord, it is an appeal from an interlocutory order made by the Court of appeal pending the appeal. I appear for the Defendant. My learned friends Sir George Lowndes, Mr. Raikes, Mr. Dube and Mr. Ameer Ali appear for the three plaintiffs. The way in which the matter arose was this. The three plaintiffs are the widows of a Raja named Durga Prasad Singh, I will call him the deceased Raja, who died so long ago as March 1916. He was possessed of a very large estate valued in this action at 100 lacs of rupees. The great bulk of that consisted of

* Transcript of the Shorthand Notes of Marten Meredith & Co., 8 New Court, Carey Street, London, W.C. 2.

an impartible raj called the Jharia Raj, which was valuable as being the site of a large coal field. My client the Defendant was his second cousin. I do not think there is any doubt that subject to such claims as the Plaintiffs have if any to a widows' estate at the time of the death my client Shiba Prasad Singh was the next heir. The deceased Raja left a will under which it appears to be stated that my client took subject to provision for maintenance for the three widows who became the plaintiffs in the action. On the death of the deceased Raja no question arose. My client as heir took possession of the Raj; he was installed on the gaddi; he was registered in the Government Register as the proprietor, and for some three years all went well. He was quite friendly with the widows. Two deeds were executed which afterwards came into controversy. So far as I can make out, they were only deeds to carry out the provisions of the will and really had not much effect. The deeds were carried out. The widows each had Rs. 500 a month for maintenance and all went well; but suddenly in the year 1919, that is three years after the Raja's death, three years during which my client was in possession of everything as heir, the widows suddenly raised the dispute that they were, so far as regards the Raj, entitled or, one of them because it was an impartible raj, to a widows' estate, and that as to the rest of the deceased Raja's properties there were some 12 or 13 lacs of rupees—they were self-acquisitions; that the will was a forgery, the usual allegations in India were made about the will and that the widows were entitled to the self-acquired property as the heirs of the deceased, and accordingly they brought an action in March 1919 just three years after the death claiming everything.

Lord Buckmaster :—Claiming the widows' estate in everything.

Mr. Upjohn :—Yes, my Lord. Of course that involved ejecting me. That action went through the usual form and came on for trial in March of the year 1921. 17 issues were raised; it is not material to go through them now. I cannot tell your Lordships how many days the trial lasted, but it was spread over five months from 9th May to 30th September. I cannot tell your Lordships how many witnesses were called, but it is stated in the court of appeal that 24,000 documents were put in evidence. The Subordinate Judge gave his judgment on 3rd November 1921. We have some figures of the values mentioned in the Order so I can put the result to your Lordships in a very concrete way. The Subordinate Judge found in favour of my client as to the impartible raj that the widow had no widows' estate in that. With regard to the self-acquired properties he found in favour of the widows and the result was as stated in the judgment itself that my clients succeeded to the extent of $86\frac{1}{2}$ lacs out of 100 lacs, about $\frac{7}{8}$ ths. I am only troubling your Lordships with these details because it is rather necessary to appreciate them in order to appreciate the Order that was made against me from which I am now appealing. The plaintiffs succeeded as to the self-acquired property consisting of 4 lacs

of small immovable properties, 3½ lacs representing the value of a long list of specific movable properties and 6 lacs of money, making 13½ lacs altogether, and the documents they complained of were set aside; but the Will on which the documents were founded was upheld. From that judgment first of all the Plaintiffs, the three widows, appealed.

Lord Buckmaster :—The effect of that judgment as you have stated it would be simply to call into effect the terms of the Will as I understand it.

Mr. Upjohn :—Not quite, my Lord.

Lord Buckmaster :—Why?

Mr. Upjohn :—They got some self-acquired properties. I have not seen the will; it is not printed.

Lord Buckmaster :—Are they outside the Will?

Mr. Upjohn :—I do not understand that they took them under the will.

Lord Buckmaster :—If they were outside the will that would be the right order.

Mr. Upjohn :—Yes.

Lord Buckmaster :—If they were within the will they would have gone with the rest of it.

Mr. Upjohn :—They ought to have gone with the rest. The will has never been proved. It was supposed to be superseded by these two documents. Your Lordships appreciate that we are only appealing from an interlocutory order and we have not a very full Record.

Sir George Lowndes :—My Lords, I think my friend is not quite correct in saying that the will gave the impartible raj to the defendant. The will was quite silent as far as we know on all those points; it merely made provision for the maintenance of the ladies and gave them certain shares in the cash.

Mr. Upjohn :—My friend may have some other information about it, but it does not matter.

Lord Buckmaster :—The will has been upheld.

Sir George Lowndes :—Yes, my Lord.

Lord Buckmaster :—The self-acquired property was outside the Will.

Sir George Lowndes :—Yes, the Will did not deal with that.

Mr. Upjohn :—My friend's view is, I am quite willing to accept it because it does not matter for this purpose, that the Will simply gave maintenance.

Sir George Lowndes :—Yes, with a share of the cash.

Mr. Upjohn :—I do not want to trouble your Lordships with a lot of the details in the case. At all events there is a very long judgment, it occupies a great many pages of the Record, setting out what it is that the plaintiffs recovered under that judgment. First of all the plaintiffs appealed. And here I went to give your Lordships a little more detail before we come to what is very important. On 15th November 1921 the plaintiffs

appealed. That would be an appeal from the decision in my favour as to the Raj. The record is in three parts. It would not matter very much if it was paged continuously, but unfortunately each Part has its own separate paging, so that it is a little awkward, I am told it is not our fault. I need not trouble your Lordships with the grounds of the plaintiffs' appeal. They give 71 reasons so that it would take rather a long time to go through them.

Lord Buckmaster :—Did they challenge the Will?

Mr. Upjohn :—Yes, my Lord.

Lord Buckmaster :—I understand that the judgment that is appealed from did no more than confirm the Will and declare that the self-acquired property was outside its provisions.

Mr. Upjohn :—Yes, my Lord.

Lord Buckmaster :—And that there was self-acquired property.

Mr. Upjohn :—Yes.

Lord Buckmaster :—Then there is an appeal brought by the present respondents on the ground that the will was bad.

Mr. Upjohn :—They alleged that the will was bad and they also alleged that notwithstanding all that had been proved as to the character of the raj, its impartible character, and that it never extended to females, that they have a claim to a widows' estate.

Lord Buckmaster :—First of all they seek to displace the Will and then to claim a widows' estate in the impartible raj.

Mr. Upjohn :—Yes, my Lord.

Sir George Lowndes :—I do not think that is quite correct. The Will does not touch the impartible raj at all.

Lord Buckmaster :—If it does not touch the impartible raj or the self-acquired property what does it touch?

Sir George Lowndes :—It gives the widows a certain amount of maintenance and certain shares in the cash at the Bank.

Mr. Upjohn :—My friend takes the view that it is only fractional shares of a specific estate.

Sir George Lowndes :—Yes.

Mr. Upjohn :—I will accept my friend's view of that. The will did not deal with these properties, and therefore the rights had to be considered apart from the Will, so that there was the dispute with regard to the raj which was the most important matter in question whether the widows or widow were or was entitled to a widows' estate and also the dispute as to the self-acquired property. On 15th November they presented their appeal and on the same day although the appeal was quite ineffective, it was not properly in Court because there was no copy of the Decree lodged and no copies of the documents lodged as required by Order 41, still they at once applied for an injunction against dealing with the property. If your Lordships would look at page 8 of Part 2 of the Record you will see in

terms the injunction that they asked for between lines 20 and 30. They ask for two injunctions. The first is the really important one against alienating or otherwise dealing with any portion of the property in suit pending the final determination of the suit. That seems rather a broad relief to ask against a man who was successful in the court below, that he is to be restrained from dealing with the property awarded to him; but they did not stop there because on the same day, the 15th November, there being as your Lordships see no effective appeal, they went to two learned Judges who granted the further and wider injunction which is the subject of complaint here, Mr. Justice Mookerjee and Mr. Justice Cuming, and at page 44 of the same Part your Lordships will see that those learned Judges *ex parte* without any notice to the successful respondent (it is at line 15) ordered: "Meanwhile let there be an *ad interim* injunction restraining the defendant, his servants or agents in terms of paragraphs 17, 27 and 37 of the Petition." That takes us back to page 8.

Sir George Lowndes :—No, it is paragraphs 1, 2 and 3 of the Prayer of the Petition.

Mr. Upjohn :—I understood that.

Lord Buckmaster :—This was in the Court of appeal.

Mr. Upjohn :—Yes, my Lord, and all that they had was the plaintiffs' own statement of what had happened; they had no copy of the Order appealed from and no copy of the judgment (?) appealed from, although Order 41 Rule 1 requires those documents to be brought in before there is an effective appeal. On 15th November 1921 they got an *ex parte* injunction preventing the Defendant from dealing with the property which had been awarded to him. The next thing was the Defendant being a man who is without means except his interest in this family property, they proceeded to enforce this judgment against him. Now will your Lordships look at page 107 of Part I of the Record which shows the application then made. Will your Lordships look at column 10 to see what they did. Having restrained him from dealing with his own property under the judgment they ask with regard to what was awarded to them: "That execution proceedings may be taken on reference to the certified copy of the decree filed herewith, and possession may be given to the plaintiffs at first of the movable and immovable properties of schedule kha"—those are the properties awarded to the plaintiffs—"and of the movable properties of schedule ga"—those were also awarded to the plaintiffs, so there you get 4 lacs of movables and 13½ lacs of immovables, the possession of those properties specifically—"and that the plaintiffs may be given possession by ejecting the defendant from the said properties or any one of them if necessary, and for the purposes thereof the necessary processes may be issued." Then passing over two lines "and an order may be passed for the arrest under a warrant of the defendant for realising the aforesaid decretal amount of " 6 lacs of rupees odd. That is the

amount of the cash judgment in their favour—"together with interest and costs of execution."

Lord Buckmaster :—Does that mean that the defendant had taken possession of that property and misappropriated it?

Mr. Upjohn :—The defendant had been in possession all the time.

Lord Buckmaster :—Does it mean he was a trustee and had taken the property? How can you arrest people for realising debts?

Mr. Upjohn :—It is personal execution. They were asking for specific execution as to the specific property awarded to them and for execution against his person in respect of their pecuniary judgment.

Lord Buckmaster :—I do not understand the extent to which such a Writ is capable of being issued in India: Can it be issued *ex parte* at any moment by any judgment creditor?

Mr. Upjohn :—At all events in this case the learned Judge required notice to be given.

Sir George Lowndes :—You cannot do it without notice.

Mr. Upjohn :—I am not suggesting that. If your Lordships will look at page 106 you will see that notice was given.

Lord Buckmaster :—Is this a discretionary writ or must it issue as of right?

Mr. Upjohn :—May I answer the question in a moment.

Mr. De Gruyther :—It is order 21 Rule 37.

Mr. Upjohn :—"Notwithstanding anything in these rules where an application is made for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court."

Lord Buckmaster :—It says "who is liable to be arrested?"

Mr. Upjohn :—Yes, my Lord. Then Rule 30 says:—

"Every decree for payment including a decree for the payment of money as the alternative for some other relief may be executed by the detention in the civil prison of the judgment debtor or by the attachment and sale of his property or by both." Then Rule 32 gives to the Court a discretion to hear the debtor before committing him and that discretion was exercised by the Subordinate Judge in this case.

Lord Buckmaster :—It is the Code of Civil Procedure of 1908.

Mr. Upjohn :—Yes. I want to pause for a moment. The position at this time was that my client was quite well known to be a man who was without means except this family property. If a man is a landowner and you take all his land from him he is a beggar. What they did was first, to prevent him by this *ex parte* Order from dealing with the property which had been declared to be his, and secondly, to enforce their own judgment against him by casting him into prison. Their object was to

stifle any resistance to this appeal and prevent him from appealing himself. There were 24,000 exhibits. An appeal where you have 24,000 exhibits to deal with can hardly be effectually conducted in *forma pauperis*, still less so if the pauper is in prison. As I submit this was an obvious attempt to influence the course of justice by stifling the successful respondent in his resistance to their appeal and by stifling any appeal on his part from the Order against him. The matter first came before the District Judge on 17th December when he ordered notice to be given. That was in the exercise of his discretion under Rule 37. Then on 20th December he directed the application to be heard on 6th January, and on 6th January he got an order from the High Court. What had happened between 20th December and 4th January was this: The Defendant presented his appeal from the judgment. He was more moderate than his opponents. He had only 61 reasons for reversing the judgment, and on the same day, turning on to Part 2 page 50, he made an application for a stay of execution pending the appeal. The prayer of that petition is at the foot of page 52. That came before another Court, and at page 68 an Order for a stay was made, and that was *ex parte*. That is quite a regular proceeding, indeed it is the proper procedure under Order 41 Rule 5.

Lord Buckmaster :—Up to that date the result was that the whole of the order was stayed.

Mr. Upjohn :—Yes, my Lord.

Lord Buckmaster :—Is that how it stands now?

Mr. Upjohn :—No, my Lord, both those orders were interim orders and both were *ex parte*. The stay your Lordships will remember on the 6th was produced to the Subordinate Judge and consequently he did nothing. There were then pending to the High Court, as the Court of appeal, two applications, one by the widows for the injunction they wanted, and one by my client for a stay. There was evidence filed and there is an immense amount of irrelevant matter in the evidence. What the widows said against my client was that he had granted building leases and secondly, he intended to commit waste by making agreements for mining leases at inadequate premiums. Our answer to that was this: I should like to direct your Lordships' attention to this to show the attitude which we took up. It is at page 74 of Part 2. This is what the Defendant says he had been doing, paragraph 24: "It is not true that the defendant respondent has invited any application for settlement of coal lands, but shortly after the termination of the suit in the lower Court many of the aforesaid people"—those were applications for leases—"had paid money for getting settlement of coal-lands"—that means simple leases I think "from the Defendant, being fully aware of the likelihood of an appeal and with full knowledge of the risk they were running in paying money for settlement of lands *pendente lite*, and the defendant accepted the same on the distinct understanding that the transactions were to be entirely

at the risk of the applicants for settlement and without any prejudice to the rights, if any, of the plaintiffs'. That was a very fair notice to give to the other side, but it was really unnecessary, because under section 52 of the Transfer of Property Act (IV of 1882) an assignee pendente lite takes subject to the litigation. Then paragraph 25 : "That I have been informed and I believe it to be true that owing to the discovery of coal in the district of Hazaribagh and other places, the value of coal lands in the Jharia estate is likely to fall considerably, and that if the advantageous terms offered now were not accepted the result would be an irreparable loss to the estate." May I remark at this stage that when the *ex parte* injunction was granted no undertaking as to damages was taken from the Plaintiffs.

Lord Buckmaster :—Does not that follow out there?

Mr. Upjohn :—No, my Lord, there is a provision in the Order under the Code of Civil Procedure that there is a liability limited to Rs. 1,000 unless the Judge requires more. Here instead of it being Rs. 1,000 it is a lac.

Lord Buckmaster :—Did not you move to discharge that *ex parte* Order?

Mr. Upjohn :—The two came on together.

Lord Buckmaster :—Did you move to discharge it?

Mr. Upjohn :—No, we did not move to discharge it.

Lord Buckmaster :—The *ex parte* Order was a Rule and it came on I suppose for hearing with notice.

Mr. Upjohn :—Yes, we did not move to discharge the injunction.

Lord Buckmaster :—There was no need.

Mr. Upjohn :—No, unless we had wanted to get out of it earlier. Then that coming on on the Rule we let that matter take its course because we were busy filing evidence and the time was wanted. The two Rules came before Mr. Justice Mookerjee and Mr. Justice Guming on 9th February of this year, 1922, that is to say, the plaintiffs' application or Rule for the injunction and my application for a stay. Your Lordships will find their judgment in part 2 beginning at page 129.

Lord Salveson :—This is the Order you are appealing from?

Mr. Upjohn :—Yes.

Lord Buckmaster :—The effect of the plaintiffs' application was that the Rule should be made absolute.

Mr. Upjohn :—Yes, and my application was that the Order for a stay should be made absolute. On page 129 the two Rules are referred to and the judgment of the learned Judges begins at line 40 page 129. "The subject matter of the litigation which has given rise to these two rules is a very valuable impartible estate, referred to in the proceedings as the Jharia raj. The last admitted owner, Raja Durga Prasad Singh, died on the 7th March, 1916. The three widows of the Raja commenced this suit on the 6th March, 1919, against Shiba Prasad Singh, who had taken

possession of the estate after the death of their husband. After a protracted trial the subordinate Judge decreed the suit in part. The claim of the plaintiffs was decreed in respect of the immovable properties Nos. 1 to 9 of Schedule (kha) to the plaint together with mesne profits. The decree further entitled the plaintiffs to movables and a large sum in cash "—that was 6 lacs—"The plaintiffs and the defendant were both dissatisfied with this decree; each side has consequently assailed the decree by way of an appeal to this court. The plaintiffs have obtained a Rule calling upon the Defendant to show cause why an order for an injunction should not be granted to restrain the defendant, his servants and agents from (1) alienating or otherwise dealing with any portion of the property in suit ending the final determination of the suit. (2) Realising and appropriating any money in respect of the money lending transactions mentioned in the Petition." I have not mentioned those; it is not very important matter, but we had succeeded in respect of those. The money lending transactions were held to be part of the family property.

Sir George Loundes :—I do not think that is correct.

Mr. Upjohn :—I think so, but it is not material for the present purposes : " (3) interfering with the possession of the plaintiffs of the three-storeyed building at Jharia or any portion thereof." I dare say my friend will agree that No. 3 is a part of the 4 lacs of immovables. The Rule further calls upon the defendant "to show cause why he should not be directed to make a full and complete discovery of the amounts invested by the late owner in money lending transactions"—that seems novel but nothing seems to have happened upon that—"and of all other properties left by him and deposit in Court or furnish security for all amounts realised." The Rule finally calls upon the defendant to show cause "why he should not pay to the plaintiff all arrears of maintenance and continue to pay the same month by month." So that he was to be prevented from dealing with the estate out of which the maintenance arose but he was to pay the maintenance; "The defendant, on the other hand, has obtained a Rule calling upon the plaintiffs to show cause why execution of the decree of the lower Court should not be stayed pending the disposal of the appeals." On each Rule an ad interim order has been made with a view to maintain the status quo till the disposal of the rules. We have heard learned Counsel on both sides with reference to the various affidavits and counter affidavits and have further ascertained the history of the case by an examination of the judgment under appeal. We have come to the conclusion that, for the present, the following directions should be given and we order accordingly"—no reasons are given—" (1) That the Defendant do deposit in this Court"—your Lordships will notice this is not stated as a term on which he is to have a stay, it is a mandatory order upon him on which to arrest him if he does not perform it—" Within four weeks from this date, a sum of three and a half lacs of rupees which the plaintiffs will be entitled to

withdraw from Court, in whole or in part, in partial satisfaction of the decree, upon furnishing security to the satisfaction of this Court for such amount as may be withdrawn by them from time to time." This Order does not in terms at all events give any stay. Had it been said: 'We will give you a stay upon that term that would be another matter.

Lord Buckmaster :—Is not that what is meant?

Mr. Upjohn :—It may be.

Lord Buckmaster :—Supposing it is what is meant you have in your hands something like 9 lacs of the personal property.

Mr. Upjohn :—If that is the true view I should not quarrel with No. (1).

Lord Buckmaster :—Let us see what the other side say about it. Do you say there is a stay, Sir George?

Sir George Lowndes :—Certainly, my Lord.

Lord Buckmaster :—Are you willing that that should be made plain by saying that that is a condition of the stay as to the balance?

Mr. Upjohn :—If that is a condition of a stay which we can accept or reject I should not say a word about it. No. (2) is a very curious Order: "That with a view to expedite the disposal of both the appeals the paper-book be prepared in the office of the Court (under such special arrangements as may be necessary) and that the entire cost of the preparation of the paper book"—this is an appeal as to part of which at all events my client is responsible—"be paid into Court by the Defendant in the first instance (within a time to be fixed later) the ultimate allocation of the cost to be determined by this Court at the time of the final disposal of the appeal."

Lord Buckmaster :—The explanation of that is that you are in possession of the whole of the cash.

Mr. Upjohn :—I should not be under this order.

Lord Buckmaster :—They would not have control of what was deposited in Court.

Mr. Upjohn :—They are entitled to withdraw it on giving security.

Lord Buckmaster :—They have to give security to repay the money that took out.

Mr. Upjohn :—Yes, my Lord, that is the explanation, but it is not worth occupying your Lordships' time over. Then: "(3) That within six weeks from this date the defendant do furnish security (other than the impartible raj) to the satisfaction of this Court to the extent of five lacs of rupees for the due performance of such decree as may ultimately be made in the suit"—so that they got 8½ lacs of rupees partly in court and partly security when the value of this judgment is only 6 lacs.

Sir George Lowndes :—13 lacs.

Lord Buckmaster :—The value of the judgment is 13 lacs.

Mr. Upjohn :—4 lacs of moveables and 3½ of specific immoveables.

Lord Buckmaster :—And 6 lacs moneys in hand,

Mr. Upjohn :—Yes. I shall submit to your Lordships that it was much more suitable in order to bring about the hearing of the appeal that a receiver should be appointed.

Lord Buckmaster :—That is what you and I would have arranged over here. But what has happened is that they have dealt with the moveable property which unless protected in some way or another may be disposed of pending the appeal, and the Court have protected it by providing that 3½ lacs are to come into Court and that security is to be furnished other than the impartible raj for the balance.

Mr. Upjohn :—Yes, my Lord.

Lord Buckmaster :—I do not know what the character of the dispute is. If there is any reason to think this personal property may be disposed of it is not unreasonable to stay execution.

Mr. Upjohn :—I submit under the circumstances the proper order would be to appoint a Receiver.

Sir George Lowndes :—We asked for a Receiver, but they violently opposed it.

Mr. Upjohn :—That is not in accordance with my instructions.

Sir George Lowndes :—We should be delighted to have a Receiver now.

Mr. Upjohn :—A Receiver of the immovables?

Sir George Lowndes :—A Receiver of the estate.

Mr. Upjohn :—Now I see what my friend means in his statement. They wanted a Receiver of the whole property so as to keep me out of the possession of that which had been adjudicated to me.

Lord Buckmaster :—The real position is this. If the character of your title to the impartible raj is so uncertain and hazardous that the Judges who tried the case, or those to whom their judgment is appealed, think it ought not to be in your uncontrolled power pending the appeal there is only one way of preventing it and that is by appointing a Receiver.

Mr. Upjohn :—If a very strong case is made out.

Lord Buckmaster :—Over here we should not consider that so much because that much be for the Judges in India to determine.

Mr. Upjohn :—I submit there has been such a violent exercise of discretion as to come within what has been said over here that the discretion is appealable.

Lord Buckmaster :—I am not saying that your appeal is incompetent. But when it has been appealed we still have to consider why we should interfere with this question of the exercise of discretion by the Judges in India.

Mr. Upjohn :—Suppose No. (3) instead of being mandatory and enforceable by execution it has been imposed as a term of the stay, so that I could accept it or reject it, be it so.

Lord Salveson :—Would you object to No. (3) being expressed without the part in brackets?

Mr. Upjohn :—I think your Lordship has put your finger on my real objection.

Lord Salveson :—The judgment gave you the impartible raj just as completely as it gave the widows a certain share of the immoveable and cash.

Mr. Upjohn :—Yes, my Lord, that is the observation when I have got through this that I am going to submit to your Lordships.

Lord Buckmaster :—The point is if you have a different thing you want to keep the matter in *status quo* so that ultimately each party may be fully satisfied as to their rights. If in point of fact the other side were entitled to the impartible raj then your giving the security of the impartible raj would give them no security at all.

Mr. Upjohn :—I think that would impale the learned Judges and my learned friends on the other branch of the dilemma. I do not object to No. (4) "That the defendant do make over possession of premises No. 239 Lower Circular Road to the plaintiffs and also of one of the motor cars decreed in their favour, and the defendant be restrained from interfering with the possession of the plaintiffs of the three-storied building at Jharia or any portion thereof, or of any fixtures therein." Those are the properties which the plaintiffs recovered in the court below. I do not object to No. (4) of course it is subject to this that if the finding of the judge in their favour is reversed then the properties will come back to me. (5) is an injunction the like of which I do not think I have ever seen. This is an injunction against the respondent appealing who has been successful in the Court below : "That the injunction already issued be maintained so as to restrain the defendant from making alienations or entering into agreement to grant leases or dealing or otherwise interfering with the estate except with the express sanction of this court previously obtained after due notice to the plaintiffs." On what ground can that be justified as against a respondent who has been successful in the court below ?

Lord Buckmaster :—It is very like appointing a new receiver.

Mr. Upjohn :—Nobody is now in a position, without breach of this injunction, to deal with this estate.

Lord Buckmaster :—You can go to the Court and ask them.

Mr. Upjohn :—Having regard to what we got under this order we do not think there is very much comfort in that.

Lord Buckmaster :—Is it quite so plain that this is a cruel and hard case ? If you go to the court and say : I want to deal with this property in this way and that way, it is all for the benefit of the estate.

Mr. Upjohn :—Supposing I say : I want to deal with this estate. I have now to find lacs of rupees for the costs of this appeal : I have to find three and half lacs to pay into court ; and I have found security for five lacs, and therefor I must give some security to anybody who will become

security for me, in other words for the purpose of this appeal I want to find something like twelve lacs of rupees, partly for the plaintiffs and partly for me. Why should not a man who says the property is mine and not only so but it has been held by the only court before whom it has hitherto been discussed to be mine, be at liberty to make a mortgage for ten or twelve lacs of rupees on the footing under the Transfer of Property Act, that the mortgagee who advances the money does it at his own risk.

Lord Buckmaster :—I gather that the objection is that this is in the nature of waster and that there are coal mines which may be worked between now and the time when the appeal comes on very much to the detriment of the estate.

Mr. Upjohn :—That is why I quoted the passage from the evidence at page 74.

Lord Buckmaster :—I noticed that.

Mr. Upjohn :—The defendant does not desire to create any lease under which there will be any coal worked. Had this injunction been limited or if it were now limited to an injunction against committing waste I should not say a word against it because that is what the defendant himself said in his affidavit on the application. We do not desire to commit waste but what we do feel is this : we have this in evidence that before the trial which of course, was an expensive trial so long ago as April, 1921 the reference is in page 2, pages 61 to 65 the three widows made a mortgage of their interest in part of this impartible raj for the purpose of raising money for the costs of the suit, and there is no injunction which will prevent them from making further mortgages of their interest if they succeed in establishing it to raise the costs of the litigation. But they have been provided under this order with three and a half lacs of rupees subject only to the condition of finding somebody who will become security so that the three and a half lacs will be repaid if they lose on the appeal as to the six lacs awarded in their favour : so that the plaintiffs are at absolute freedom in every way to raise money for the security of their interest whatever it may be for the purpose of carrying on the appeal. But my client is put in this position, he has to find in cash eight and a half lacs of rupees and if he is to go on with this big appeal with 24,000 exhibits he has to find money for his legal advisers, and by this order he is prevented from making any alienation except with the leave of the court. Why should a man who says this is my property do this, if I make an alienation it will not affect the other side a bit. In the first place there is the section of the Transfer of Property Act. I am perfectly willing to give an undertaking that my client will not raise money for any body without giving specific notice of this litigation to the lender, but why should this unfortunate man who has the burden of this enormous appeal upon his shoulders and who has nothing whatever in the world except his interest in the subject matter of this litigation be prevented from doing

what, I should have, everybody was at liberty to do if he can find anybody to lend him money on the security of his interest, whatever it may be, taking the risk of his interest being null, not be at liberty to do it?

Lord Buckmaster :—If the mortgage was a mortgage which did not create power in the mortgagee to cause waste would there be any objection to it?

Mr. Upjohn :—I cannot conceive that there would be.

Lord Buckmaster :—Is not the real thing that they are trying to prevent waste?

Mr. Upjohn :—Is it?

Lord Buckmaster :—Is not that what they mean to do?

Mr. Upjohn :—They mean that perhaps, but they mean a great deal more: it is perfectly general making alienation dealing with the estate or interfering with the estate.

Lord Buckmaster :—If the meaning were what I have suggested it would be very easy to modify those words. If the meaning is what you say this man cannot deal in any way with this property even though it was to restrain the man from obtaining the loans pending the trial. That is a much more severe order.

Mr. Upjohn :—Clause (5) on page 131 says: "That the injunction already issued be maintained so as to restrain the defendant" and so on. In order to see what clause (5) really is one has to look back on the injunction already granted which is in the terms of the prayer at page 8. Will your Lordships look at page 8, line 20. He claims an injunction against "(1) alienating or otherwise dealing with any portion of the property in suit pending the final determination of this suit (2) realising and appropriating any money in respect of the above mentioned money-lending transactions (3) interfering with your petitioners' possession of their said three-storied building at Jharia or any portion thereof or of any fixtures therein."

Lord Buckmaster :—That was the immoveable property they have got. The only thing that would apply to would be the impartible raj.

Mr. Upjohn :—Yes. The matter came before another Bench of the High Court. I will just finish reading this and then I will go to that. They felt the same difficulty. The Bench of the High Court which granted this leave obviously had a doubt whether there was any power to make this order.

Lord Buckmaster :—Clause (5) is a distinct thing subject to a different kind of argument to the others. (1) and (3) only appear to be the conditions upon which execution is to be stopped as against you and relate to property you have in hand which, according to the existing decrees, is the property of the respondent.

Mr. Upjohn :—I accept that my Lord. If your Lordship will modify the form of it so as to make it plain that there is a stay.

Lord Buckmaster :—There is no trouble about that because your opponents assent to that.

Mr. Upjohn :—My friend assents to that.

Lord Buckmaster :—The whole thing is (5).

Mr. Upjohn :—Yes, my Lord.

Sir George Lowndes :—Might I make a statement with regard to No. (5) ? We have never regarded that as meaning what my friend Mr. Upjohn says,—restraining them from dealing with other than the corpus of the estate. We have left them in full possession of the whole income, ten lacs of rupees a year and we do not object to their receiving the whole of the income. What we do object to is to their wasting the corpus of the estate.

Mr. Upjohn :—My friend may take that view here.

Lord Buckmaster :—He says if that is not plain he will make it plain. I did not see that No. (5) really affected you with regard to the income.

Mr. Upjohn :—It says " or otherwise interfere with the estate."

Lord Buckmaster :—That is a mistake of using those general words. What he says is you may keep the income which is ten lacs a year.

Mr. Upjohn :—My friend puts it in this way now but we have some evidence about that. The income is now falling off on account of competition of other coal lands.

Lord Buckmaster :—However much it falls of it is very big.

Mr. Upjohn :—Yes.

Sir George Lowndes :—You have had it for six years.

Mr. Upjohn :—What we have to do is to find at once if we want a stay, eight and half lacs with the cost of the paper book.

Lord Buckmaster :—That you can find out of the money there is which you have, the six lacs in cash.

Mr. Upjohn :—To the extent of six lacs, yes.

Lord Buckmaster :—The other is moveable property.

Mr. Upjohn :—Three and a half lacs is moveable, but that is not cash in hand. That will not help us to raise the money to go into court or to give security for the five lacs under paragraph (3).

Lord Buckmaster :—You have to pay three and a half lacs into Court and then you have to pay for the preparation of the paper book, whatever it is.

Mr. Upjohn :—That will be about fifty thousand rupees call it four lacs together. But how am I to get security ? I am not allowed to offer the security of the raj ; that is excluded and I quite appreciate as between me and the plaintiffs that is not a desirable security to them, but then I have to get somebody to become security on my behalf under (5).

Lord Buckmaster :—Why do you not deposit your 3½ lacs of immovable property. No doubt they would be quite contented with that.

Mr. Upjohn :—Perhaps they would like a receiver. Your Lordships will see what this sort of thing is by looking at page 91. It is jewellery,

motor cars, billiard tables, and so on. That is at page 91 of part 1. It is a schedule to the Order.

Lord Salveson :—Are you willing to be restrained from dealing with the other movable property ?

Mr. Upjohn :—Yes, I am willing to put it into any warehouse that can be agreed upon in joint names and let it be insured if that will relieve me from finding three and a half lacs of rupees, which is the estimated value of it. Then there are a few horses and buffaloes. Taken quite generally the only really valuable things are articles in a very small compass indeed. I am perfectly willing to put those in a warehouse in joint names and let them be insured pending the final determination of the appeal.

Sir John Edge :—What about the buffaloes and the horses ?

Mr. Upjohn :—Perhaps the buffaloes and horses could be sold. One must pass to page 94 to see what they recovered. There is another schedule on pages 96 and 97. They are small things.

Lord Buckmaster :—Personally I should have thought your opponent would have been very glad to have had all these things in Court. He does not appear to have done so. He appears to have accepted in its place Orders (1) and (2) and (3) which are the conditions of a stay of execution against you but having that we pass on to No. (5). With regard to No. (5) if you are left in uncontrolled receipt of the rents and profits of this property how really are you hurt ? The extent to which you are hurt is that you cannot grant a lease which if the appeal goes against you would be bad.

Mr. Upjohn :—I understand that the lawyers are quite satisfied about my title. I am told that there would be no difficulty about raising the money on proper terms. There is evidence that the income has fallen off, but even taking any figure approaching what my friend mentions it does not enable me to produce ten or twelve lacs on the spot. That is what I have to do. Probably no one will go security for me except as a mortgagee, so that I have really to find nine lacs under clauses (1) (2) and (3) or four lacs for my own costs.

Lord Buckmaster :—You can get rid of (1) (2) and (3).

Mr. Upjohn :—Then I go to prison.

Lord Buckmaster :—Why, if they are satisfied you will not go to prison.

Mr. Upjohn :—I could not satisfy them.

Lord Buckmaster :—You have the money.

Mr. Upjohn :—No, I have not indeed. That is the very allegation they make against me.

Lord Buckmaster :—What have you done with these six lacs of rupees ?

Mr. Upjohn :—Your Lordship knows about income in England, I will read their own statement about it in part 2 at page 126. They say I have nothing except my interest in these properties. I do not think anybody has taken upon themselves to say that I get ten lacs or anything like it a year. There is a passage in which my client or his agent points out that

when you have paid the Government Revenue and the other outgoings there is nothing like that. I think the ten lacs of rupees is on the footing that there is development of the coalfields. We do not desire, pending this appeal, to grant leases which involve waste. I know very much the way in which your Lordships would look at it, namely that the property must be preserved without injury for the victor in this litigation. My client said he did not seek to commit waste or to grant leases.

Sir John Edge :—Who has been in possession of the immovables ?

Mr. Upjohn :—The Defendant has been in possession.

Sir John Edge :—That is your client ?

Mr. Upjohn :—Yes.

Sir John Edge :—What has he done with them ?

Mr. Upjohn :—I remember reading a passage in the evidence in which it is stated that there really is not very much coming in.

Sir George Loundes :—At the bottom of page 27 we state that the income is ten lacs and you reply to that and do not deny it.

Mr. Upjohn :—This is a statement in a petition that the income amounts to about ten lacs a year which has been misappropriated by the defendant. There is some evidence by the defendant.

Lord Buckmaster :—This is the position as it strikes me. The learned judges in India before whom this case has to come regarded this as a hazardous litigation. They do not think that your title under the decree as it has now been made is so certain that they ought to leave you in control of this estate, so they attempted to make an order which will protect everybody in case the present decree is overthrown. How can you do it other than by some such Order as this or by appointing a receiver ? It looks as if the real meaning of No. (5) was to appoint a man who has the property as receiver. It would be much more onerous against you if you were in fact appointed receiver because you would be accountable for the income which you are not now.

Mr. Upjohn :—Appreciating that, my point is this. Supposing I were appointed receiver and manager, or supposing a stranger were appointed receiver and manager where is the jurisdiction ? And even if there is jurisdiction where is the reason for preventing me from dealing with the interest which I claim at my own risk ? How does it affect the Plaintiffs or the estate. It very much hampers me, and that is the whole object of getting this Order from the learned Judge. It puts me in the position of having to find eight and a half lacs of rupees otherwise no stay. If I accept a stay upon those terms where am I to raise the eight and a half lacs ? It really does not help me to say at some time or other you will collect the income. The answer is I want eight and a half lacs at once, otherwise there is no stay, and I shall then be sent to prison because there is still pending an application for execution against me by committing my person to prison. Your Lordships remember that at page 106 the

application for execution stood over pending the stay. If I do not accept the terms of the stay, or if I do not comply with the terms of the stay, the stay goes. Therefore the application would be restored and I shall be committed to prison. That, of course, is such a hampering of me in the way of conducting the appeal that justice is not likely to be done on the appeal, and we say that is the object of all these proceedings, cleverly contrived by clever lawyers and vakils out in India. On the other hand I desire to comply with the terms of the stay and to find the eight and half or nine lacs. It is no good, with all deference, to say :
• You have had the money in years gone by. This man, I suppose, considered that he had a good title, and I presume, like other people in his position in India, he had been badly hit by many circumstances and probably has spent the rest. The answer is he has not got it.

Lord Buckmaster :—He has still a perfectly good security unaffected by the Order of the Court.

Mr. Upjohn :—That is all I desire to do, but under this order I cannot.

Lord Buckmaster :—You can mortgage your income. There is nothing to prevent your doing that.

Mr. Upjohn :—I am restrained from making alienation or dealing with the estate. That is the point of my objection.

Lord Buckmaster :—That means the corpus of the estate.

Sir George Lowndes :—Yes. We are quite willing to have it made clear. We have always understood that.

Lord Buckmaster :—Sir George Lowndes is quite willing, it would be the corpus of the estate. That leaves you plenty of power to raise money.

Mr. Upjohn :—That may help me a little.

Lord Buckmaster :—It helps you a great deal.

Mr. Upjohn :—Why should I be restrained from dealing with my interest in the corpus ?

Lord Buckmaster :—I will tell you why, because the Court before whom this matter has come think the title is so hazardous that it ought not to be the subject of the mortgage.

Mr. Upjohn :—What jurisdiction is there to do that ?

Lord Buckmaster :—There is always the jurisdiction to stay execution.

Mr. Upjohn :—This is not under the stay of execution.

Lord Buckmaster :—It is equivalent to a stay of execution with regard to real estate.

Mr. Upjohn :—See what that will do. This matter was discussed I know not on how many days during five months and there is a long judgment printed in the Record extending over 50 pages. In the end the only judge who has really considered the matter held I was entitled. Then the learned judges who did not have the evidence before them, they have had a number of statements made by hearsay by the Agents of the parties on the one side and the other for the purposes of this application, reversed

the finding of the judge below. What jurisdiction is there to do that? They say this matter is so doubtful that you are not to be treated as having money. I am going to put it in this way. What prejudice can happen to the plaintiffs, what possibility is there of their being deprived of the fruits of their appeal by my being allowed to do what every person claiming property is entitled to do, namely deal with his interest for what it is worth. I venture to think not one of your lordships has ever heard of a case in which a man was restrained from dealing with his own beneficial interest for what it was worth. I can understand an injunction against alienation going against a man who has a legal estate and can convey a better title to his alienee than he has himself, and a title which may prejudice the real owner.

Lord Buckmaster :—Is it outside your experience that receivers have been appointed of the rents and profits of real estate pending an appeal?

Mr. Upjohn :—No my Lord, but that would not prevent other people to the appeal from dealing with their interest, whatever it is.

Lord Buckmaster :—Sir George Lowndes seems quite willing that that may be done. It would be a much more onerous order for you if you were appointed receiver, because the receiver immediately becomes accountable for the rents and profits.

Mr. Upjohn :—My learned friend Sir George Lowndes before he could persuade your Lordships to grant an Order would have to persuade you as to the character of the claim on both sides.

Lord Buckmaster :—If this matter were in the Courts here and a receiver had been appointed by the Court of Appeal it would be almost impossible for the House of Lords to interfere with that pending the appeal to them unless it could be shown that there was some appalling miscarriage of justice which had taken place.

Mr. Upjohn :—I put it in this case that there will be an appalling miscarriage of justice.

Lord Buckmaster :—You say this man will be gravely embarrassed but it does appear to me that they have left you less embarrassed than they might have done had they proceeded strictly and granted a stay of execution with regard to the movable estate and granted a receiver of the rest.

Mr. Upjohn :—I do not know of any case in which the Court of Appeal has appointed a receiver against a successful respondent, unless upon some evidence of damage to the estate.

Lord Buckmaster :—That is for the Courts below. This is mining property. These people if they succeed may find adverse mortgagees in and have to get them out again.

Mr. Upjohn :—Any mortgagee pending this litigation under the Transfer of Property Act takes subject to the Plaintiffs' title; he is made a party to it and the Order goes against him. He is made a party to the appeal.

and the same order is made against him as against the respondent. It cannot affect the Plaintiffs whether they have a claim for eviction against A or A and B. Can any suggestion of that sort really countervail a man's right to deal with his interest?

Lord Buckmaster :—If the point really is if it is hazardous leaving you in undisputed control and possession of the rents it does not appear to me to be a very hard thing.

Mr. Upjohn :—Before I deal with it further I should like to read to your Lordships what the other Bench said about this order.

Lord Buckmaster :—Supposing that is the effect of the Order what is the jurisdiction of this Board to entertain the appeal?

Mr. Upjohn :—That is under clause 40 of the letters Patent and Article 109 Clause C of the Civil Procedure Code.

Lord Buckmaster :—I am assuming now that this is a discretionary Order which has been made by the Court of Appeal to preserve the property in status quo.

Mr. Upjohn :—I thought your Lordship meant what was the jurisdiction to appeal from an interlocutory order.

Lord Buckmaster :—Only on the assumption that the Courts here have issued this order for the purpose of preserving in tact the subject of the litigation in any event, what power is there for us then to interfere?

Mr. Upjohn :—I have only been able to find some English authorities about this.

Lord Buckmaster :—Is not the matter more difficult when you are dealing with appeals from native Courts to this Board?

Mr. Upjohn :—I do not know whether it is going to be disputed that the appeal is competent to the Board? That being so the question is on what principle will the Court interfere. For the moment I am assuming that it is pure discretion.

Lord Buckmaster :—There are two things. The first question is whether such an appeal should be brought. The second question is even assuming it could be brought is it such an appeal as in accordance with the usual practice of this Board, the Board would entertain and interfere with the Order made. Those are two distinct questions.

Mr. Upjohn :—Yes.

Sir George Lowndes :—I do not propose to argue this point now though I think it is very doubtful whether the appeal is competent.

Lord Buckmaster :—You propose to base your case upon the other question, assuming the appeal lies is this such a case in which the Board would hear an appeal?

Sir George Lowndes :—Yes, that is it.

Mr. Upjohn :—I say first of all there is no jurisdiction in the Court of Appeal to make an Order preventing a successful respondent from

dealing with such an interest as he has in the subject matter of the litigation.

Sir John Edge :—A successful respondent who is not appealing.

Mr. Upjohn :—Who is appealing as to part. For this purpose I am not dealing with the appeal where he is an appellant because there he has a stay and your Lordships are going to modify the language of the order so as to bring it in accordance with the jurisdiction. I was only dealing now with him as having succeeded in the Court below in establishing his title to the raj. That decision is impeached on appeal, and therefore to that extent he is the successful respondent. My first submission then is that there is no jurisdiction to prevent him from dealing with such interest, if any, as he has.

Sir Lawrence Jenkins :—Does it not strengthen your position to some extent that you were in possession before the litigation ?

Mr. Upjohn :—I am much obliged to your Lordship. After all this defendant took possession without any question on the death of the deceased Rajah, he was installed on the gaddi, was registered in the Government Register. I suppose these ladies fell under the advice of some lawyers and commenced this litigation exactly three years almost to the day after the defendant had been in undisturbed and undisputed possession of all that is now in dispute.

Lord Salveson :—His title is absolutely to the land in question ?

Mr. Upjohn :—Yes, at present. He is absolutely entitled to the raj.

Lord Salveson :—I do not myself very well see how the Plaintiffs would derive any advantage from this because whatever you do with regard to this property will not be binding upon them if they are found to be entitled to the heritage, and the land cannot run away.

Sir George Lowndes :—But the coal does.

Mr. Upjohn :—I have offered to undertake to do no act of waste and to sign no document which will authorise any act of waste. That is why I read my evidence before the case came before the learned Judge at all.

Sir John Edge :—What is to become of the royalties from the coal mines if you receive them.

Mr. Upjohn :—We are not proposing to grant mining leases.

Lord Salveson :—Will you give that undertaking ?

Mr. Upjohn :—We offered the undertaking but they granted the injunction. If I may answer your Lordships' question : • What is the benefit to them ? Legally it is none, because of section 52 of the Transfer of Property Act. The real benefit to them, the benefit for which these applications have been made, the application for the injunction and the application for execution is that they are seeking to put this man in a position in which he will not be able to make his case effectively in the Court of Appeal.

Lord Salveson :—In order to stifle opposition, if that is the object it would be a very hard case.

Lord Buckmaster :—How can you make that out on the face of the figures. If you are in receipt of 10 lacs of rupees how can it be said you are prevented from appealing ?

Mr. Upjohn :—There is no evidence that I am in receipt of 10 lacs.

Lord Buckmaster :—There is evidence of that.

Mr. Upjohn :—No, my Lord, there is not. The witness only says he is informed as to that.

Sir George Lownes :—They reply to that actual paragraph in their affidavit and they do not deny that the estate is worth 10 lacs of rupees a year. That I submit is almost conclusive.

Lord Buckmaster :—For interlocutory purposes it is strong at any rate.

Sir George Lownes :—That statement is at page 27. The reply is at page 98 paragraph 69.

Lord Salveson :—I understood Mr. Upjohn's view was that he cannot find 8½ lacs now although he may have 10 lacs of income.

Mr. Upjohn :—I think my friend is incorrect. The paragraph he refers to deals with a different matter altogether.

Sir George Lownes :—No, that is in reply to a paragraph where this statement is made.

Lord Salveson :—Their statement is that the Respondent has no property apart from the heritage.

Sir Laurence Jenkins :—I see that is stated at page 4 of your Case which quotes from the Record.

Mr. Upjohn :—I am obliged to your Lordship.

Sir Laurence Jenkins :—It is page 142 paragraph 30.

Mr. Upjohn :—I am obliged to your Lordship, that is the paragraph and this of course is verified at the foot of page 142. "That moreover as your petitioner has recently had to meet heavy demands of Government and other public bodies, there is not sufficient money in your petitioner's hand, and on account of labour strikes and railway strikes the income has already begun to fall and your petitioner apprehends further fall in the near future as the income principally consists of royalties on despatches of coal, nor is it possible for your petitioner to raise any money on account of the restraints imposed upon him, and under these circumstances your petitioner is seriously hampered in the prosecution of his appeal and in his defence of the appeal of the plaintiff."

Lord Salveson :—Is not your point in presenting this appeal so that you will be free to execute a mortgage over the real estate on the footing that the mortgagee will take the risk of the issue of the appeal ? That will do no harm to the Plaintiffs so far as I can see.

Mr. Upjohn :—Your Lordship remembers that in his evidence which

was before the court he expressly said that he would give notice to every party so that there should be no question whatever about it although in truth nothing depends upon notice, because you have the provision of the Act. At Page 74 of Part 2 it says that the defendant accepted certain arrangements "on the distinct understanding that the transactions were to be entirely at the risk of the applicants for settlement and without any prejudice to the rights, if any, of the Plaintiffs." I am perfectly willing because I do not in the least want to do anything which will be unfairly prejudicial to the other side to give an undertaking that in any mortgage or other alienation that the defendant makes he will give notice to the party with whom he is dealing of this litigation and expressly provide that the dealing is without prejudice to the rights, if any, of the plaintiffs in the suit. How can they be entitled to ask the court, and how can the court have jurisdiction to grant an injunction preventing a man from dealing with that which is indisputably his own, namely, his chance of succeeding? In effect that is all the mortgagee will get, a mortgage of my client's chance of succeeding or his chance of retaining the benefit of the judgment he has. What jurisdiction there is to prevent a man from dealing with that which indisputably is his own I cannot conceive, nor indeed could the learned Judges, the Chief Justice and Mr. Justice Richardson.

Lord Buckmaster :—The point is, is it indisputable?

Mr. Upjohn :—The chance of keeping it is indisputably mine.

Lord Buckmaster :—The chance of keeping property is no property at all.

Mr. Upjohn :—In substance if I say "I am the owner of property, that property is in litigation, will you lend me 10 lacs of rupees on my interest in that property whatever it may be? But mind you it is the subject of litigation and you must take subject to the chance of the appellant's reversing the judgment below," why should not I not be allowed to do so. Assuming a man becomes an assignee pendente lite he can be made a party to the appeal. If he is committing waste an injunction can be obtained against him at once. If he takes possession without committing waste it is immaterial to the plaintiff whether the property is in possession of the mortgagee or not. I have offered already an undertaking not to execute any lease and I will extend that to a mortgage or any other disposition.

Lord Salveson :—Do you feel confident that you will get some-body to lend on this security?

Mr. Upjohn :—Yes, my Lord.

Lord Buckmaster :—Would you be prepared to limit that to what is called a simple mortgage?

Mr. Upjohn :—As distinguished from a unfructuary mortgage?

Lord Buckmaster :—Yes.

Mr. Upjohn :—Yes, My Lord.

Sir Lawrence Jenkins :—So that possession would not pass,

Mr. Upjohn :—Possession would not pass until default.

Sir George Lowndes :—Then you would default at once.

Mr. De Gruyther :—In a simple mortgage you do not get possession at all.

Lord Buckmaster :—The point is whether it is to be so arranged that possession cannot be had as against the other side. That is the real point.

Mr. Upjohn :—When I said until default I was wrong. Sir Lawrence Jenkins has corrected me. If I execute a simple mortgage if I remember rightly a case which was discussed before the Board not very long ago, the only remedy of a simple mortgagee is by an application for sale.

Lord Buckmaster :—Yes.

Sir George Lowndes :—But the mortgagee can always give him possession. That is why he is restrained from mortgaging.

Mr. Upjohn :—If my friend is so alarmed about it I will undertake not to give possession to any mortgagee.

Lord Buckmaster :—Does not this meet most of your difficulties? If he undertakes to execute nothing but a simple mortgage and not to give possession to the mortgagee you are not hurt, are you?

Sir George Lowndes :—Yes, I think that means this, that if he chooses to put the mortgagee in possession under a mortgage the mortgagee is entitled to say against me when I come to the estate: I am in possession under a mortgage.

Lord Buckmaster :—But he undertakes not to do that.

Sir George Lowndes :—His undertaking is not worth the paper it is written on.

Lord Buckmaster :—He can be sent to prison at once.

Sir George Lowndes :—But I lose my property.

Lord Buckmaster :—Indeed you do not.

Sir George Lowndes :—If I find a mortgagee in possession I shall have to turn him out.

Lord Buckmaster :—It is obvious that the mortgage is worthless in that case and the man would go to gaol pending the appeal.

Sir George Lowndes :—There is no question about that.

Lord Buckmaster :—If he breaks his undertaking.

Sir George Lowndes :—I hope there is no question about that.

Mr. Upjohn :—You tried to send him to gaol.

Lord Buckmaster :—I sincerely hope that when an undertaking is given to the courts in India there is prompt and summary punishment for the man who breaks it.

Mr. Upjohn :—I desire that what I am asking your lordships to say should be made absolutely binding.

Lord Buckmaster :—I want to see how you are hurt if that is done.

Sir George Lowndes :—I am hurt because my clients are ladies who are

not very competent to act for themselves and they will be launched into further litigation. That is the view the High Court has taken.

Sir Lawrence Jenkins :—Is it not the fact that any question of possession even as against the mortgagee would be decided in the execution proceedings in this suit, and the fact that there was a mortgage would be no defence? If the right to possession goes against Mr. Upjohn's client, it would also go against the mortgagee.

Mr. Upjohn :—Yes, my Lord, instead of being a judgment against me it would be a judgment against me and my mortgagee who would be added.

Mr. Upjohn :—He could be if they chose and no doubt they would.

Sir George Lowndes :—Would your Lordship allow us to think over that suggestion?

Lord Buckmaster :—What the Board wants to do is to take care that nobody is hurt. This appears to be a proposal by which you are not hurt.

Sir George Lowndes :—Would not the answer be if it is a reasonable proposition the order of the High Court says you may come to us.

Lord Buckmaster :—We had better put the matter right now and avoid further applications. I wish you would just talk that over with your clients. Your lady clients have well fortified their own personal infirmities by securing most competent legal advice, so that I do not think we need be asked to pity them.

Sir George Lowndes :—Of course I know a great deal more of this Record than my friend has told your Lordships about. As a matter of fact this gentleman has been extraordinarily clever in actually alienating.

Lord Buckmaster :—Will you see if that proposal is adequate and if not what is the proposal that you want.

Mr. Upjohn :—We have the assistance of a gentleman from India who is personally familiar with the matter and we should like to be able to do this. This is what we offered to the Court below. It has been very irregularly printed in the supplement because it was merely a suggestion of Counsel but if you look at the Supplemental Record, the last one of them, at pages 3 and 4 are the suggestions of Sir B. C. Mitter who then appeared for my client in answer to the Court as to what he would agree to. "Injunction will be limited to the lease or sale of underground rights in coal lands but the defendant will be at liberty to enter into agreement to grant leases after termination of this appeal in this court; on the basis of such agreements the defendant will be at liberty to obtain selamis from the people who enter into such agreements at their own risk," that as a matter of fact is practically the management of the estate. I want to tell your Lordships this from the evidence. Our view at all events is that owing to the development of other coal land and owing also to troubles now is not a very good time for securing agreements for collieries, and the plaintiffs I submit can be

under no prejudice whatever if we are allowed to protect the estate on the assumption that it is our estate by granting agreements.

Lord Buckmaster :—You want first of all the right to grant a mortgage and also the right to grant these leases which will not come into effect until after the appeal.

Sir George Lowndes :—I can accept the first part but if you have the second part, supposing I come into the property and there is an agreement for a lease at a certain rate how can I hope to make another agreement at a better rate, it must prejudice me.

Lord Buckmaster :—Is not the agreement utterly bad ?

Sir George Lowndes :—I should submit if a man is entitled to get selamis he wants to get the ready money at once, and we shall never get it again.

Lord Buckmaster :—He will have paid the selamis for nothing. How does it hurt you ? The lease is not to be granted until after the appeal is over, no possession is to be taken while the appeal is on and if these people do pay selamis for a certain right and in the end it is held these people cannot grant this lease they will never get the lease at all.

Sir George Lowndes :—Our people are very much afraid of this granting of selamis. My friend says he cannot find 5 lacs of rupees but he has already received selamis for a great deal more. We are very much afraid of this granting of selamis.

Mr. Upjohn :—We had to pay all the costs of the trial spread over five months.

Lord Buckmaster :—I want to see how such an arrangement can do you harm. I want to assume that you may win and I want to see how if this is permitted you can possibly be injured. I do not see it myself.

Sir George Lowndes :—I have to look at it through Indian spectacles. This offer was made to the High Court and these Judges in the country being very much more familiar with these coal lands thought it was an offer which ought not to be accepted and it is very difficult for me to say I will accept it.

Lord Buckmaster :—The trouble is this ; it appears to be the only offer and that would not have protected you against this interference by a mortgagee who entered into possession. Now we have that and that was not before the court who made the order.

Sir George Lowndes :—This was before the court.

Lord Buckmaster :—Yes, but not the other thing. If you limit the injunction it makes no difference. The mortgagees can start granting the very leases which you cannot grant yourself. Therefore that by itself gives them no real property.

Sir George Lowndes :—I am entirely in your Lordships' hands. I do not know much about these coal lands in Bengal but I am much impressed with the fact that that was the real thing they wanted from these very experienced Judges in Bengal.

Lord Buckmaster :—If they had made the complete offer that is being made now I should have thought there was a great deal in that. It is quite plain that that offer by itself left a loophole so big that you could get the whole thing through it :

Sir George Lowndes :—Your Lordship means it ought to have sale or mortgage.

Lord Buckmaster :—Yes.

Sir Lawrence Jenkins :—How would you be hurt? You say you will not get selamis.

Sir George Lowndes :—No, he will have got it once.

Sir Lawrence Jenkins :—That will not interfere with your getting a selami.

Lord Buckmaster :—He will have got a selami for nothing.

Sir George Lowndes :—You do not get anything for nothing in India. People do not pay these selamis for nothing. He has already got it in this way, and I cannot conceive a man paying a selami today for the chance of getting a coal lease in three or four years time.

Lord Buckmaster :—I do not see how he can possibly grant any such lease. You can have liberty to apply.

Sir George Lowndes :—They have that now. They can go to the court now.

Lord Buckmaster :—There is all the difference in the world when you are dealing with an estate without the court and with the court. It is a long job with the court. I think if you have liberty to apply and such an order as this made that you are protected. I do not see how you are not protected.

Sir George Lowndes :—Frankly I do not see how they can hurt me, but I cannot imagine these things being done at all unless the object is to get something.

Mr. Upjohn :—Then my friend will not be hurt.

Sir George Lowndes :—I cannot conceive how a man will pay me £1,000 for a thing if he is not going to get something out of it.

Sir Lawrence Jenkins :—For the chance of it.

Sir George Lowndes :—For the chance of getting it five years hence. I am in your Lordships hands. I want to be quite clear.

Lord Buckmaster :—Let us see if we can put this matter right. (1) (2) and (3) are all subject to the stay. Upon those terms execution is stayed.

Mr. Upjohn :—I offer no objections to that.

Lord Buckmaster :—Then (4) is not in issue.

Mr. Upjohn :—No my Lord.

Lord Buckmaster :—(5) will have to be modified. Let us see how it has to be modified. " But such injunction is not to prevent from granting simple mortgage or mortgages of the estates."

Sir George Lawndes :—Would not your Lordships say of his interest in the estate?

Lord Buckmaster :—I do not think it matters. There is nothing in that. We will say "of his interest in the estate, such mortgage or mortgages being subject to the provisions of section 52 of the Transfer of Property Act 1882, and the defendant undertaking not to confer possession upon such mortgagee or mortgagees." That seems to be right, does it not?

Mr. Upjohn :—Yes, my Lord.

Lord Buckmaster :—Then you meant this other thing.

Mr. Upjohn :—If your Lordship pleases. That is at page 3 of the Supplement.

Lord Buckmaster :—Let us see if that wants altering "and not to prevent the defendant subject as aforesaid from entering into agreements to grant leases to take effect after the determination of this appeal."

Mr. Upjohn :—Would not your Lordships say "of this litigation" otherwise we have the fact that the agreement takes effect after the hearing.

Lord Buckmaster :—Yes.

Mr. Upjohn :—"After the final determination of the litigation" We do not want to trouble your Lordships again.

Lord Buckmaster :—I suppose you must also undertake not to put those leases into possession.

Mr. Upjohn :—It should read "not to prevent the defendant except as aforesaid from entering into agreements to grant leases after the final determination of this litigation."

Sir George Lawndes :—"To grant leases to take effect." It should be.

Lord Buckmaster :—Yes, "agreements to grant leases to take effect after the final determination of this litigation."

Sir John Edge :—"This litigation as to title."

Sir John Edge :—"This litigation as to title," it may go on for years.

Mr. Upjohn :—After the determination of the litigation as to the raj.

Lord Buckmaster :—He is not to grant leases until "the final determination of the title to the property."

Mr. Upjohn :—If your Lordship pleases and then on the basis of such agreements the defendant is to be at liberty to obtain selamis from the people who enter into such agreement at their own risk but no possession in respect of such rights is to be made over to the persons entering into the agreements.

Lord Buckmaster :—Yes.

Mr. Upjohn :—I feel a little difficulty about "otherwise interfering with the estate." Would it not be right to say "is not to prevent the defendant from collecting rents and otherwise managing in the ordinary course of management,"

Lord Buckmaster :—We must not say "otherwise managing?" "other-

wise interfering with the estate except for the purpose of collecting the ground rents."

Mr. Upjohn :—We might find a tenant who was treating the property badly.

Lord Buckmaster :—Then you could go to the High Court for liberty to eject him. I do not think there is much harm in that.

Lord Salveson :—Would it not be better to say "the corpus of the estate."

Sir George Lowndes :—Yes, my Lord.

Lord Buckmaster :—"Interfering with the corpus of the estate."

Sir George Lowndes :—If your Lordships please.

Mr. Upjohn :—"Except with the sanction of the Court."

Lord Buckmaster :—Yes.

Mr. Upjohn :—Then (6) is not a very big matter, and I do not propose to trouble your Lordships about that. I am told it is something under a lac and what he collects can come into court. I suppose that is where the mandatory part of the order ends. That being so perhaps your Lordships would not be interested to know what the other Bench thought about this order.

Lord Buckmaster :—I do not think we are. In modifying this order of course we are modifying it in accordance with Sir George Lowndes' wish. It is modified at their own instance. Would you rather have an agreed order? The Board would always prefer an agreed order, but it may well be that you would rather not have it?

Sir George Lowndes :—I will take the responsibility with regard to the first two points, but I confess that I am unwilling to take the responsibility of agreeing to his about the selamis. Your Lordship will understand that difficulty.

Lord Buckmaster :—Then you will bring before the Registrar the period incorporating those terms and that will be the order which the Board will humbly advise His majesty to make, and the costs of this application will be costs in the appeal.

Mr. Upjohn :—I suppose the proper course would be to make that order.

Lord Buckmaster :—The Registrar tells me that there is some difficulty here about making the cost in the appeal and I think the better way will be to reserve them until the hearing of the appeal, and you can add of course that the Board expresses the opinion that the costs ought to follow the events.

Sir George Lowndes :—I submit your Lordships should not say that. We think the appeal is quite unnecessary and that they could have gone to the High Court. Supposing we fail we have a very big estate to have.

Lord Buckmaster :—If you fail you ought never to have got this order.

Sir George Lowndes :—Surely I am entitled to have the property preserved in tact.

Lord Buckmaster :—If you fail in the end I do not think you can complain of paying the costs.

Sir George Lowndes :—I was assuming I succeed on what I have got in the lower court....

Lord Buckmaster :—Unless there is something very wrong about interlocutory order of this kind or the appellant is manifestly out of court, it is common form for the party who has obtained some material modification to pay the costs of it.

Sir George Lowndes :—I am in your Lordships' hands.

Lord Buckmaster :—That must be determined at the hearing. If you like leave it like that without any further expression. Costs of this application reserved till hearing.

Mr. Upjohn :—I would rather have your Lordships' expression. However we shall have the shorthand notes.

Lord Buckmaster :—What has been said has been said.

Lord Buckmaster :—Their Lordships will humbly advise His Majesty that the order of the High Court dated the 9th February, 1922, ought to be varied by ordering (1) that execution against the appellant of the decree of the Court of the Subordinate Judge at Alipur, dated the 3rd November, 1921, ought to be stayed pending the hearing of the appeal therefrom, on the terms that the appellant complies with Clauses 1, 2 and 3 of the Order dated the 9th February, 1922, provided, however, that the time for making the deposit referred to in Clause 1 thereof, and the time for the furnishing of security mentioned in Clause 3 thereof ought to be four and six weeks respectively from the date on which His Majesty's Order in Council on this appeal is lodged in the High Court, and (2) that paragraph 5 of that Order ought to be set aside, and that in lieu thereof it ought to be ordered that the injunction already issued be maintained so as to restrain the appellant from making alienations or dealing or otherwise interfering with the corpus of the estate or entering into agreements to grant leases, except with the express sanction of the High Court previously obtained after due notice to the respondents, but that such injunction ought not to prevent the appellant without such sanction from (a) granting a simple mortgage or simple mortgages of his interest in the estate, such mortgage or mortgages being subject to the provisions of the Transfer of Property Act, 1882, Section 52, the appellant undertaking not to confer possession upon the mortgagee or mortgagees, and (b) entering into agreements to grant leases to take effect after the final determination in the present litigation of the title to the property, the appellant being at liberty, on the basis of such agreements, to obtain *salamis* from the persons who enter into such agreements at their own risk, he undertaking not to confer possession upon such persons. Liberty ought to be reserved to the parties to apply to His Majesty in Council with reference to the payment of the costs of this appeal after the determination of the appeal now pending in the High Court.

DYING DECLARATIONS AND THEIR ADMISSIBILITY IN EVIDENCE.

The admissibility of a dying declaration in evidence is an exception to the rule which excludes hearsay. This exception as such dates back as far as the first half of 1700—the period when the hearsay rule was coming to be systematically and strictly enforced, and at the same time certain excepted cases were coming to be recognised and defined. The ruling of Lord Mansfield in *Wright v. Littler* in 1761 is generally taken as the leading early case though the notion that special trust may be imposed in deathbed statements was already long understood. Shakespeare makes the wounded Melun finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis exclaim:—

“ Have I not hideous death within my view,
Retaining but a quantity of life,
Which bleeds away even as a form of wax
Resolveth, from his figure ‘gainst the fire ?
What in the world should make me now deceive,
Since I must lose the use of all deceit ?
Why should I then be false, since it is true
That I must die here and live hence by truth ?

—King John Act 5, Sc. 54.

In the trial of *Sir Walter Ralegh* (1603) [Jardine Crim. Tr. 1, 435] the accused argued “ besides a dying man is ever presumed to speak the truth.” In the *Earl of Pembroke’s trial* (1678) [6 How. St. Tr.] the deceased’s statements after the assault though apparently not made in consciousness of approaching death were received in the view that the “ sayings of a dying man in such circumstances are remarkable.” Reference may also be made to *Lord Mohun’s Trial* (1691) [12 How. St. Tr.] *R. v. Reason* (1722) [16 How. St. Tr.], *Earl Ferrier’s Trial* (1760). [19 How. St. Tr.]

The purpose and reason of the hearsay rule is the key to the exception to it which is mainly based on two considerations, a necessity for the evidence and a circumstantial guarantee of trustworthiness. In other words the ground of admissibility of dying declarations is said to rest firstly on necessity, the injured person who is generally the principal witness being dead, and secondly on the presumption that the solemnity of the approach of death impels the party to speak the truth and supplies the obligation of an oath. *Nemo moriturus presumitur mentiri*. The truth of such a declaration is deemed to be *prima facie* guaranteed by the

special conditions of admissibility imposed. The principle cannot be better expressed than in the words of Lord Chief Baron Eyre in *Reg. v. Woodcock* 1 Leach C.C. 500. "The general principle on which this species of evidence is admitted is that they are declarations made in extremity when the party is at the point of death and when every hope of this world is gone ; when every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth ; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of Justice." Hence the dying declaration of a child of tender years will be rejected unless he appears to have had that degree of religious knowledge which would render his evidence receivable ; as likewise will that of an adult whose character shows him to have been a person not likely to be affected with a religious sense of his approaching dissolution. [Best 11th Ed. p 474]. The expression "at the point of death" used by Eyre C. B. seems to have given rise to much misapprehension. In *Reg. v. Osman* (15 Cox C. C. 1) Lush L. J. said "The admission of a dying declaration is a strong exception to the rule of law that statements made behind the back of the prisoner cannot be given in evidence. A dying declaration is admitted in evidence because it is presumed that no person who is immediately going into the presence of his Maker will do so with a lie on his lips. But the person making the declaration must entertain a settled hopeless expectation of immediate death ? If he thinks he will die to-morrow it will not do." In this view the learned Judge refused to admit the dying declaration in the case in question although the statement was recorded by the Magistrate after taking care to put the following questions to the deceased, "Do you think that you are in bodily danger and in fear of death, You are not expecting to recover, are you aware that you will die ?" the answer to which was in the affirmative. This view of Lush L. J. as to the necessity of the expectation of immediate death was not approved in later cases in which it was held that all that was necessary was that it must be proved that the man was dying, that there was a settled hopeless expectation of death and nothing else. In *Reg. v. Gloster* 16 Cox. C.C. 471 Charles J. observed as follows—"The result of the decisions is this ; that there must be an unqualified belief in the nearness of death ; there must be a belief without hope in the declarant that he is about to die. The language of the learned judges in the different cases has varied but that is the result . . . Immediate death (the expression used by Lush L. J. in *Reg. v. Osman*)

must be construed in the sense of death impending not on the instant but within a very very short distance indeed." This was in 1888. Coming to recent times the Court of Criminal Appeal consisting of Lord Alverston C.J., Darling and A. T. Lawrence JJ. in considering this question in *King v. Perry* (1909) 2 K. B. 697 declined to follow the dictum of Lush L. J. in *Reg. v. Osman* and accepting the statement of the law in the later cases laid down: "The presence or absence of expectation on the part of the declarant of immediate death is not the true test as to whether a statement as to the cause of death is admissible or not. Death must be imminent but the material point is that the statement must be made when every hope of life was gone from the person making the statement. Thus the principle deducible from the English cases would seem to be that the Judge must be satisfied that the expectation of death is so immediate as to give the declaration a solemnity sufficient to dispense with the sanctions necessary to ensure the purity of evidence in other cases."

In English Law dying declarations are only admissible when the death of the person who made them is the subject of the charge, [Halsbury, Laws of England, section 762]. In this country the law on the subject was formerly contained in section 371 of Act XXV of 1861 and section 29 of Act II of 1855 and it was decided under those sections that the rule of English law restricting the admission to cases of homicide had no application in India *Q. v. Bissessur Mookerji* (6 W. R. Cr. 75). The present Evidence Act (I of 1871) now clearly enacts that statements made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death are relevant whatever may be the nature of the proceeding in which the cause of the death of the person who made the statement comes into question; illustration (a) gives an example of a civil as well as of a criminal case.

The Indian Law on the subject is thus widely different from the English law according to which a dying declaration is not admissible in a civil case and in criminal cases only in the single instance of homicide that is murder or manslaughter when the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declaration. On the other hand in this country the statement is relevant whatever may be the nature of the proceeding in which the cause of the death of the person who made the statement comes into question. Further according to English Law certain conditions are required to have existed at the time of the declaration, viz., it is necessary that the declarant

should have been in actual danger of death, that he should have been aware of his danger and have abandoned all hope of recovery and that death should have ensued. The existence of the last condition is of course as necessary in India as under the English law inasmuch as the statement is admissible only in cases where the cause of the death of the maker of the statement is in question. But under the Indian Evidence Act the statement is relevant whether the person who made it was or was not at the time when it was made under expectation of death. Therefore whether the declarant was or was not in actual danger of death and knew or did not know himself to be in such danger are considerations which will not affect the admissibility of this kind of evidence in India. These considerations however ought not to be laid aside in estimating the weight to be allowed to the evidence in particular cases. It is worthy of remark that in Scotland it is immaterial except as regards the weight of the evidence whether or not the declaration be made under the impression of impending death but when a party has received a mortal wound an account of the matter given by him at any time subsequent to the injury will be admissible in the event of his death provided it were made seriously and deliberately and whilst the deceased appeared to be aware of what he was doing and in the possession of his faculties. The same view seems to have been entertained in England also at one time as appears from *R. v. Blandy* (1752) 11 How St. Tr. 1137.

The dying statement must be taken in the presence of the accused ; if not so taken the writing cannot be admitted to prove the statement made : *Emp. v. Samiruddin* [I. L. R. 8 Calc. 211]. This is a point of great importance and ought to be borne in mind. In the case noted above the dying statement of the deceased had been recorded by the Deputy Magistrate as a deposition but it did not appear that the deceased had been examined in the presence of the accused ; this evidence was however admitted at the trial before the Sessions Judge although the Deputy Magistrate had not been called to prove the writing taken down by him. The case came before Pontifex and Field JJ. who held that unless the deceased was examined in the presence of the accused and unless he was so examined by the Deputy Magistrate exercising Judicial Jurisdiction the writing made by such Magistrate could not be admitted to prove the statement made by the accused. The statement must have been proved in the ordinary way by a person who heard it made. If the Deputy Magistrate had been called to prove it he might have

refreshed his memory with the writing made by himself when the Statement was made.

In *King Emperor v. Mathura Thakur* 6 C. W. N. 72 the dying declaration sought to be relied on was recorded in English and not in the language in which it was given and the Magistrate who recorded it was not examined. It was held that the statement was not properly in evidence. It was pointed out that witnesses should not have been allowed to prove the document as if it was a substantial piece of evidence in the case. The relevant fact to be proved was the statement made by the deceased person. That statement was not the document made by the Magistrate but the verbal statement made by the deceased person. The document made by the Magistrate did not amount to a deposition or record of evidence. It was not taken in the presence of the accused ; nor was it taken in their absence under the provisions and conditions prescribed by section 512 Criminal Procedure Code. The only way of proving the statement was therefore by the oral evidence of some witness who heard it made, the said witness being at liberty to refresh his memory by referring to the note made by him or made over by him at or about the time the statement was made.

In *King Emperor v. Daulat Kunjra* (6 C. W. N. 921) a Sub-Inspector of police on information received from the chowkidar of the commission of the offence went to the hospital to see the wounded man and there recorded the statement made by him. It was held that the writing containing the statement so recorded by the Sub-Inspector and attested by witnesses could not be regarded as evidence and in order to make it evidence the course indicated in *Emp. v. Samiruddin* (I. L. R. 8 Calc. 211) should have been followed.

In *Jotindro Nath Chatterji v. Emperor* (11 C.W.N. 666) Rampini and Gupta JJ. held that a dying declaration recorded in the absence of the accused by a Magistrate other than the Magistrate who held the enquiry preliminary to commitment to the Court of Sessions was not admissible in evidence unless it was proved by the Magistrate who recorded it. A note in the ordersheet that the document was admitted without any objection on the part of the accused did not make any difference.

In *Gruridas Namasudra v. Emperor* (13 C.W.N. 680) the deceased after being injured went to the Magistrate and lodged a petition of complaint. The magistrate examined him on oath, recorded his statement in compliance with the provisions of section 202 Criminal Procedure Code and sent him to hospital where he died. The

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statement recorded by the Magistrate was treated as a dying declaration and it was proved by the production of the Magisterial record, the Sessions Judge holding that under section 91 of the Evidence Act no other evidence was admissible. Maclean C. J. and Carnduff J. held that a dying declaration as such was not a matter required by law to be reduced to the form of a document, and therefore section 91 of the Evidence Act ought not to have been applied. The precise statement made ought to have been proved by the Magistrate or some one who heard it as laid down in *Emp. v. Samiruddin* (I. L. R. 8 Calc. 211) and *King Emperor v. Mathura Thakur* (6 C. W. N. 72).

In *Emperor v. Balaram Das* (I. L. R. 49 Calc. 358) the dying declaration had been written by a Magistrate in the presence of the Assistant Surgeon who had sent for him. At the time of the Sessions trial the recording Magistrate was dead but the Assistant Surgeon deposed that it had been taken down in his presence by the Magistrate whose handwriting and signature he knew and who had read over the deposition to the deceased. It was held that the procedure laid down in *Emp. v. Samiruddin* having been followed the statement was admissible. The view of the Calcutta High Court on the subject has been fully accepted in Madras, *Prosecution v. Bala Nagi Reddi* (22 M. L. J. 453).

In *E. v. Abdulla* I. L. R. 7 All. 385 in a trial upon a charge of murder it appeared that the deceased shortly before her death was questioned by various persons as to the circumstances in which the injuries had been inflicted on her, that she was at that time unable to speak but was conscious and able to make signs. Evidence was offered by the prosecution and admitted by the Sessions Judge to prove the question put to the deceased and the signs made by her in answer to such questions. It was held by a Full Bench of the Allahabad High Court (Mahmud J. dissenting) that the questions and the signs taken together might properly be regarded as verbal statements made by a person as to the cause of her death within the meaning of section 32 of the Evidence Act and were therefore admissible in evidence under that section. Petheram C. J. with whom agreed Straight, Oldfield and Brodhurst JJ. held: 'verbal' means 'by words'. It is not necessary that the words should be spoken. If the term used in the section were oral it might be that the statement must be confined to words spoken by the mouth. But the meaning of verbal is something wider." Mahmood J. observed—"verbal" cannot mean more than by means of a word or words. Nodding the head or waving the

hand is not a word. Section 32 Cl (1) can only apply to statements oral or verbal. This case has been very recently followed by the Calcutta High Court *Emperor v. Sadhu Charan Das* 26 C. W. N. 414. So also in America it has been held that the declaration may be by signs or any other method of expressing thought: *Com v. Casey* (11 Cush 417, 421) cited in Best p. 456.

Wherever the circumstances of the case permit the statement should be taken in the presence of the accused, otherwise the difficulty pointed out in the case of *Emp. v. Samiruddin* I. L. R. 8 Cal. and the cases that follow it will arise.

Where a statement ready written was brought by the father of the deceased to a Magistrate who accordingly went to the deceased and interrogated her as to its accuracy, paragraph by paragraph, it was rejected in Ireland by Mr. Justice Crampton who observed that "in the state of languor in which dying persons generally are their assent could be readily got to statements which they never intended to make, if they were but ingeniously interwoven by an artful person with statements which were actually true" and his Lordship added "the Magistrate should not have trusted to the relation of a third person but should have taken down the deceased's declaration from her own lips or at least have had it taken down in her presence. *R. v. Fitzgerald* 1841 Ir. Cir. R. 168, 169.

If the statement be not taken down in the presence of the accused and as a formal deposition it will be nevertheless relevant but before it can be admitted in evidence it must be proved to have been made by the deceased and there is nothing in the law which renders it admissible without such proof because it was taken down by a Magistrate. Before the statement is admitted proof must be given that the person who made it is dead and the onus to prove it is under section 104 of the Evidence Act on the person who wishes to give the statement in evidence.

The dying declaration being the most important piece of evidence must be as exact and full as possible (*Prosecution v. Bala Nagi Reddi* 22 M. L. J. 453) and if it is inconsistent with the other prosecution evidence, full of material contradictions and discrepancies it is useless (*Shahdin v. Emp.* 20 P. W. R. 1909). The statement must be as to the cause of the declarant's death or as to any of the circumstances of the transaction which resulted in his death, that is, the cause and circumstances of the death and not previous or subsequent transaction, such independent transactions being excluded as not falling within the principle of necessity

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on which such evidence is received. (*R. v. Mead* 2 B. & C. 605 ; *R. v. Hind* 8 Cox. 300).

The declarations of the deceased are admissible only as to matters to which he would have been competent to testify if sworn in the cause. They must therefore in general relate to facts only and not mere opinion and they must be confined to what is relevant to the issue : *R. v. Sellers* (1796) Carr. Cr. L. 233 cited in Taylor 11th Ed. 493.

Where the declarations have been properly made the right to offer them in evidence is not restricted to the prosecution but they are equally admissible in favour of the accused (Taylor. p. 494) and a dying declaration made to a police officer in the course of an investigation is not affected by section 162 of the Code of Criminal Procedure and is admissible in evidence if reduced to writing and signed by the declarant. (I. L. R. 7 All. 385).

It is admitted on all sides that this kind of evidence should be received with the greatest caution. Though these declarations when deliberately made under a solemn sense of impending death and concerning circumstances wherein the deceased is not likely to be mistaken are entitled to great weight if precisely identified, it should always be recollected that the accused has not the power of cross-examination, a power quite essential to the eliciting of the truth as the obligation of an oath can be and that when a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge or in the case of mutual conflict the natural desire of screening his own misconduct may affect the accuracy of his statement and give a false colouring to the whole transaction. Further the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences also of the violence may occasion an injury to the mind and an indistinctness of memory as to the particular transaction.

Suresh Chandra Mukerji,
Vakil, High Court.

The Calcutta Law Journal.

RULE AGAINST HEARSAY AND THE INDIAN EVIDENCE ACT.

Sec. IV. The theory of enactment by implication.

We have seen that the *enactment* of section 11 is based on an intentional departure from Mr. Stephen's own ideas and thus represents the intention of the Legislature as distinguished from the intention of Mr. Stephen. We shall now try to show that the *omission* of the specific rule of exclusion, known as the rule against hearsay, is based on Mr. Stephen's intentional departure from the English law ; but in this case there is no conflict between the intention of the Legislature and the intention of Mr. Stephen.

We have already seen in p. 160 how Mr. Stephen meets the argument that statements made out of Court may be admissible under section 11. He says there that the elaborate provisions in sections 32-39 show that it was not the intention of the Legislature to admit them. Here lies the germ of theory that a rule excluding such statements is tacitly assumed.

The greatest objection against this theory is this that the "Introduction" and the Digest of Evidence show conclusively that the omission of a specific rule for excluding statements made out of Court was intentional on the part of Mr. Stephen. One of the main-objects of codification of the law of evidence in India is to get rid of ambiguity of English law and the rule that hearsay evidence is not to be admitted is cited as an instance of this ambiguity (p. 3 of the Introduction) ; in p. 6 of his Introduction to the Evidence Act, he says that this rule is capable of bearing at least three different senses :—(i) No witness shall ever be allowed to depose anything which he has heard said by any body else ; (ii) what a person reports on the information of some one else, and not upon the evidence of his own senses, is inadmissible ; and (iii) hearsay—irrelevant. Mr. Stephen says that (i) will exclude terms of a contract or defamation etc. ; (ii) though a valuable rule, does not convey the natural meaning of the words ; and (iii) is unintelligible without

understanding what is meant by relevancy about which English law is silent. In his Introduction to the Digest of Evidence, he says that the expression that hearsay is not evidence wrongly assumes that one knows what is meant by evidence by the light of nature and conveys no impression to one who does not know what is meant by evidence and is no better than the following instruction to a pupil who has never seen a cat, "Lions are not cats in one sense of the word, nor are tigers not leopards, though you might be inclined to think they were." He says that the best way is to begin by showing a cat and hence he turns to the question, "What is evidence?" which again takes him to relevancy on which all rules of evidence are, according to him, based. It is this attempt of Mr. Stephen to put all rules of evidence, even the exclusionary ones, into terms of relevancy, unmindful of the effect of history and expediency, that has led Prof. Thayer to criticise Mr. Stephen's treatment of the law of evidence as having the aspect of a *tour de force* (Thayer—Preliminary Treatise p. 266 footnote).

If the omission of a cut and dried rule against hearsay was intentional, then it cannot be said to be a defect in draftsman's unskilfulness or ignorance reducing a statute to nullify as is referred to in *Salmon v. Duncombe*, (1886, App. Cas. at p. 634 ; cf. Maxwell, Interpretation p 43-4). Nor is there any such absence of adequate expression of intention of Legislature which alone can let in the doctrine of implied enactment or legislation by construction. The omission being intentional there is no reason for filling up the gap with the help of alleged construction ; this way of filling up gaps has been lamented and even pronounced dangerous in several recent decisions of the highest Courts. Moreover the Indian Evidence Act was drawn up by a celebrated lawyer. [In *Bell-Cox v. Hakes* (1890, 15 A. C. 544,) Lord Field refers to the improbability that the eminent lawyers who framed the Judicature Act, 1875, would not have made a certain exception if they intended it].

With regard to the admissibility of *judgments*, there is in section 43 a specific rule of exclusion (subject to some exceptions) and if it had been the intention of the Act (or of Mr. Stephen) to exclude unconditionally all *statements* made out of Court offered as proof of the fact stated, then such a rule of exclusion might easily have been inserted.

The absence of such a rule cannot be said to make the Indian law wholly unintelligible ; statements made out of Court may in some cases, according to the interpretation we have suggested, be admitted under section 11, even though they may not come under

sections 8, 9, 14, 17-39, 155, 157 ; but they must have to satisfy a hard test, namely, *making the existence or non-existence of a fact in issue highly probable or improbable, immediately or mediately*. This will not make the Act unintelligible or unreasonable but will rather make it accord with the spirit of modern criticism. It will enlarge the discretion of the Court and this is quite in harmony with sections 165 (which enables the Judge to put any question that he likes, relevant or irrelevant) and 167 (which enacts that in the absence of proof of failure of justice mere improper admission or rejection of evidence will be no ground for varying the decision) of the Act. The only way it will restrict the power of the Court is by forbidding it to reject evidence which, in its opinion, is highly probative.

The one great argument in favour of this "implied enactment" theory is that some of the sections of the Act (namely, sections, 32, 33 etc.) have the appearance of being exceptions to a rule of exclusion, without having much to do with probative force ; i.e., they look like rules of admissibility as distinguished from relevancy. We have seen already that Mr. Stephen does not recognise the existence of rules of admissibility as distinguished from rules of relevancy. The implied enactment theory is wholly inconsistent with Mr. Stephen's fundamental tenet that all rules of admissibility are rules of relevancy. These sections (Ss. 32-39) contain what are known as exceptions to the rule against hearsay and some of the provisions seem to declare a statement of an absent person as relevant without any reference to the relation between the facts stated (embodied) in these statements and facts in issue. There are three links here—(i) from evidence (oral or documentary statement) to the statement of a person made out of Court ; and (ii) from this statement of a person made out of Court to the facts stated ; (iii) from these to facts in issue or relevant facts. Sections 6-16 apparently relate to (iii) ; (i) comes under Part II, Proof i. e. instruments of evidence. Secs. 32, 33 etc. relate to (ii) and thus the term "relevant" is used in a sense apparently different from what it bears in (iii) ; the effect of these sections is to say that if a fact is relevant under sections 6-16, then evidence may be given of a statement of that fact ; i. e. the statement will not be excluded. These three processes (i), (ii), (iii) have some points of agreement and difference ; thus (i) differs from (ii) inasmuch as (i) is an inference from statement in Court and, therefore, tested, whereas (ii) is from a statement made *out of* Court, and, therefore, untested ; again both (i) and (ii) consist of inferences from statements and thus differ from (iii) which is an inference from a fact ; but again as a statement is

itself a fact, all of these are inferences from facts to facts. If one insists on the difference, one may object to the use of the same term, relevant, in connection with all these inferences. Thus Mr. Phipson objects to the use of the term relevant as to (ii) ; he would confine it only to (iii) ; even Mr. Stephen does not apply the term to (i) about which he says that there can be no rules ; (experience is the only guide—see p. 57 of the Introduction) : and he applies the term to the probative force of a statement only in sections 32-39 and he does so without reference to the connection of these facts (i. e. the facts stated) with facts in issue. To put it briefly, these sections say that if the facts embodied in the statement are relevant, evidence may be given of these statements i. e. these statements are not to be excluded. The question, then, arises are these sections intelligible only as exceptions to a rule of exclusion, following deductively from the general rules of relevancy or, if not so following, to be assumed for the purpose of making these sections relevant ? Or is it possible to adopt any other view of these sections ? To answer this question it is necessary to discuss the place which these exceptions occupy in the Indian Evidence Act.

Section V. The Sections of the Act (Sections 17-39) relating exclusively to Relevancy of Statements made out of Court.

"The concluding part of the chapter on relevancy of facts enumerates exceptions which are to be made to the general rules as to irrelevancy. The rules as to admissions, statements made by persons who cannot be called as witnesses and statements made under circumstances which in themselves afford a guarantee for their truth, are an exception to the exclusion of statements as proof of the matter stated," (Stephen's Introduction p. 164). Sections 17-31 deal with admissions of which confession is treated as a species.

Section 32 runs thus :—

"Statements, written or verbal, made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :—

"(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

"Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

"(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty, or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

"(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

"(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and such statement was made before any controversy as to such right, customs or matter had arisen.

"(5) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

"(6) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

"(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a).

"(8) When the statement was made by a number of persons, and expressed feelings or impression on their part relevant to the matter in question."

The provisions obviously are more liberal than that of English law with regard to exceptions to the rule against hearsay; thus the Indian Evidence Act admits dying declarations in both civil as well

as criminal cases and admits them whether the declarant was or was not under immediate apprehension of death; it does not require contemporaneous, personal knowledge and exclusion of collateral matters in admitting statements made in the course of business; it extends the admissibility of statements against interest by recognising certain additional forms of interest besides pecuniary and proprietary ones and by rendering them admissible under certain circumstances even if the persons who made them be still living; as regards statements of deceased relatives it does not restrict them to cases of pedigree only.

Section 33 relates to the admissibility of depositions in a previous judicial proceeding; section 34 relates to entries in books of account, section 35 relates to entries in public records made in performance of duty; section 36 to statements in maps, charts and plans; section 37 relates to statements in official gazettes etc.; section 38 relates to official publications of law or law-reports; section 39 says that it is sufficient to give evidence of the necessary part only.

In p. 160 while meeting the argument that such statements may be admitted under section 11, Mr. Stephen refers to the elaborate provisions of sections 32-39 as to the particular classes of statements as showing the intention of the Legislature to exclude such statements. He goes on to say in p. 160, "the sort of facts which the section 11 was intended to include are facts which either exclude or imply more or less distinctly the existence of facts sought to be proved." There is vagueness and ambiguity here. The exceptions are always supported with the help of reasons as if their recognition is based on pure logic apart from any historical forces. If the logic of these exceptions is the real thing, there is no reason why these exceptions should be considered as forming an exhaustive list; if the circumstantial guarantee of trustworthiness that characterises these exceptions, is present in the case of any statement not specifically mentioned here, such a statement should be admitted. The difficulty arises from Mr. Stephen's emphasising on the reason of the exceptions as being their sole justification and at the same time using language which may be argued to convey the idea that these exceptions form an exhaustive list. The exaggeration of the importance of logic leads to a fondness for stating rules in the form of cut and dried rules, in the form of metaphysical first principles or at any rate, of demonstrative certainties; and this fondness leads to a confusion between "almost all" and "all" in his own mind which is a source of great perplexity to commentators. The question arises,

are we to take the exceptions as exhaustive or are we to apply in each case the *ratio decidendi* laid down by Mr. Stephen in p. 160 of his Introduction where he says, "the sort of facts which the section (sec. 11) was intended to include are facts which either exclude or imply more or less distinctly the existence of facts sought to be proved?"

We have already discussed the scope of section 11 and the effect of the proviso suggested by Mr. Stephen but not enacted by the Legislature. This suggestion of Mr. Stephen has however misled many as regards the scope of section 11; this, coupled with the vagueness of his language as to the scope of sections 32-39, has produced the impressions that the sections relating exclusively to statements are the only sections under which a statement may become relevant. There is one conclusive argument against this view, namely, that statements being facts, may become relevant under some of sections 6-16 and these sections and more specially the illustrations appended to them can leave no doubt as to this. Sections 32-39 (or even sections 17-39) lay down only some of the exceptions to the rule against hearsay; while some of the remaining exceptions come under sections 6-16, namely, the various exceptions which were formerly described without discrimination by one common name, *res gestae* (which phrase has recently been very severely criticised for its extreme vagueness and looseness—Cf. Prof. Thayer, Prof. Wigmore, Lord Blackburn whose remark, "If you wish to tender inadmissible evidence, say it is part of the *res gestae*" is quoted by Mr. Tregarthen in his book on hearsay which he says is primarily intended for the analysis of the various ideas to which the phrase is indiscriminately used). We shall discuss the Indian law with regard to these exceptions in section VI which relates to admissibility of statements under sections not relating *exclusively* to statements. The view that the sections relating *exclusively* to relevancy of statements are the *only* sections relating to relevancy of statements overlooks this plain fact that the Legislature admits statements under some of the sections relating to relevancy of facts.

In order to illustrate the view that is usually adopted in Courts here we shall take a concrete case from a law report. In *Bela Rani v. Mahabir Singh* (I. L. R. 34 All. 341) the issue was as to the date of death of one M. D. Immediately on her death in 1898, an application was made for mutation of names in revenue registers, supported by sworn testimony of her sons to the effect that she died on the 16th March, 1898. The question arose in a suit instituted in 1910, when the sons were dead, as to the admissibility of the statements of the sons, Richards C. J. said, "There is no

doubt that if these depositions are admissible in evidence, they supported the case of the plaintiffs. They are not necessarily conclusive, but having regard to the date at which they were made and the persons who made them they would be important I think it impossible to hold that a statement of relevant fact which would be inadmissible under section 32 could be admissible under section 11" (ib. p. 343) The other Judge said "The making of such a statement is, no doubt, a fact which would make the fact in issue highly probable and as such might be admissible in evidence. The terms of section 11 are, it is true, very wide but they must be read subject to the other sections of the Act. . . . If that fact is a statement made by a person who is not called or cannot be called, the statement cannot be admitted unless it comes within the purview of subsequent sections of the Act, for example, sections 32 and 33. That such was the intention of the Legislature is manifest from the elaborate provisions of the Act as to relevancy of evidence" (ib. p. 344).

This view involves a theory as to the scope of section 11 which we have shown to be untenable and also a theory as to the scope of the sections relating exclusively to statements as the only sections under which statements may be admitted, which is demolished by the fact that statements may become admissible under some of sections 6-16, even for the purpose of proving the facts stated (for which see section VI). One of the psychological causes of this theory is the strong tendency of Judges to refer to English law on the point, unmindful of the precise effect of the language of the Legislature, which tendency is strengthened in this case by the ambiguity and vagueness of Mr. Stephen's own language on the point. It is not remembered that the Indian Evidence Act not simply amends but also consolidates the law of evidence. The latest reported case in which a statement on oath in a previous case was admitted is *R. v. Eriswell* (1790, 3 T. R. 707), where it was admitted in the Court of the first instance and on appeal the Judges being equally divided as to the admissibility, the decision was upheld. Since this decision, the English Courts have uniformly rejected statements not falling under any of the recognised exceptions. The Indian case we have cited above related to the date of death of the mother of the persons the admissibility of whose statements on oath was in question. This case is, therefore, similar to what is known as "pedigree cases" in England. It was at one time a moot point in English law whether evidence as to date and place of birth was admissible even in "pedigree cases,"

but the weight of opinion is in favour of its admissibility. Ill. (1) to section 32 runs thus :—

The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day is relevant.

Ill. (m) relates to a statement as to the date of marriage. The words "relates to the existence of relationship" is held to be wide enough to cover statements as to the commencement of relationship in point of time and as to locality when it commenced or existed. There is no reason why an exception should not be recognised in the case of termination of relationship by death even though there may not be an English ruling on the point. There does not seem to be any English case rejecting a statement by a deceased relative (with special means of knowledge) as to the date of death of a relative. Unfortunately the celebrated lawyer who argued in favour of the admissibility of the statement did not rely on clause 5 of section 32 and try to bring his case within the words, "relates to the existence of relationship." He thought, we have seen, roughly, that the statements were admissible under section 11 as their probative force was very strong.

The reasoning of the Judges reminds one of the remarks of Lord Coleridge C. J. in *Blake v. Albion Life Assurance Co.* (L. R. 4 C. P. D, 109 ; 1878). which related to a discussion as to the admissibility of similar transactions to prove agency ; he said, "In any but an English Court, and to the mind of any but an English lawyer, the controversy whether this evidence is or is not evidence which a Court of justice should receive would seem, I think, supremely ridiculous, because every one would say that the evidence was most cogent and material to the plaintiff's claim". I may remind the readers of the remarks of some eminent men on the rule against hearsay cited in the introduction to this essay. In England the position of the exceptions is giving rise to difficult problems ; but there seems to be a good deal of unanimity of opinion in favour of the view that the exceptions form an exhaustive list and that the Judges cannot add to their number on the basis of general principles. This view seemed to have been disturbed for a time by the opinion of the majority of the Judges in *Sugden v. St. Leonards* admitting post-testamentary declarations of a testator as proof of the contents of the missing will on the basis of principles underlying the recognised exceptions to the rule against hearsay.

Even Cockburn C. J., whom we remember in connection with *R. v. Bedingfield* and *R. v. Wainright* as adopting a strict view of

admissibility of evidence, said that the declarations were admissible as all reasons for the exceptions to the rule against hearsay exist in the case of a testator. Jessel M. R. also proceeded on the same reason and said that the reasons for the exceptions to the hearsay rule all "exist in the case of a testator declaring the contents of his will" ... "rules of evidence were made for the purpose of furthering truth and justice" and that the "Courts should not be anxious to restrict them narrowly." The view of the minority that the exceptions are exhaustive in number and not merely illustrative is in accord with the majority of decisions. Lord Blackburn whose sarcastic remark upon *res gestæ* we have already cited elsewhere said in *Sturla v. Freccia* (5 App. Cas 623), about a document, "unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible." Lord Herschell L.C. said in *Woodward v. Goulstone*, "I cannot help feeling that for the Courts to add at will, from time to time, any new exceptions which appear to be capable of being supported on principles similar to those which have been established would be introducing a dangerous uncertainty into the law of evidence." (This learned Judge admits in the same case that there is much to be said in favour of systems of law which freely admits statements of deceased persons). It may seem strange that this argument of Herschell L. C. really supports our case if there is any substance in our contention that there is no rigid rule of exclusion of statements made out of Court in India as in England ; it is not the proper business of Courts to deal with the provisions of the statutes enacted by the Legislature as the Indian Courts deal with section 11 and the Indian Evidence Act generally. In England the maxim that only the best evidence can be given has now lost its identity, being merged in certain rigid rules of exclusion ; in India rightly or wrongly, Mr. Stephen (and so the Indian Evidence Act) has sought to dispense with the necessity of such a negative rule by putting all rules of admission and rejection of evidence wholly into some positive rules of relevancy. It is not the business of the Judges to substitute their own intention or even the intention of the framers of the Act where it clearly differs from the intention of the framers or the provisions of English law. This attitude of the Judges appear all the more objectionable when we remember that the wisdom of the rigid exclusionary rules has been challenged by eminent thinkers and that these rigid rules are not recognised by many enlightened systems of jurisprudence and that in some leading decisions of English Courts the exceptions to these rules have

exceptions to harmonise the provisions which exist in the Act, relating to relevancy and relevancy of statements in particular.

It has been seen before that the omission of the rule of exclusion have been intentional on the part of Mr. Stephen. To substitute positive rules in place of negative ones is one of the fundamental aims of Mr. Stephen and he refers to the rule against hearsay both in his Introduction to the Act as well as in the Digest. Moreover where he discusses the various senses of the rule (in p. 6 of Introduction) his language shows that he was under an apprehension that such a rigid rule would exclude evidence of statements forming parts of the issue or used circumstantially. (See section IV of this essay). (Reference may be made to the fact that Mr. Stephen was an acute thinker in support of the conclusion that the omission was not intentional). The effect of assuming a rigid rule of exclusion, would be to make Indian law intolerably stricter than English law unless the whole framework of the Act is modified. The two alternatives are to make Indian law decidedly more literal or decidedly (intolerably) stricter than English law according as one does not or does assume a rule of exclusion.

(ii) Some of the sections laying down general rules as to relevancy (secs. 6-16) may admit statements (for which see section VI of this essay) and so if a rule of exclusion is assumed provisos explanations and exceptions will have to be added to these sections as otherwise there will be an irreconcilable conflict between the rule of exclusion and these sections which relate to relevancy of facts generally and refer to statements only as being included within facts. These sections admit statements even for the purpose of proving the facts stated. There is nothing in the Act to differentiate the scope of section. 11 in this respect from sections 7, 8, 9, 14 etc. This subject is discussed in section VI of this essay carefully as this demolishes the theory that sections 32-39 lay down the only exceptions to the rule against hearsay.

Before passing to a discussion of the sections (sections 6-16) which relate to relevancy of facts generally and which may admit statements as statements are also facts, we should note one objection to our view, namely, that our view converts sections 17-39 into

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appeared again; the tendency of the exceptions to expand in size and number and thus to eat into the rigid rules of exclusion which became visible in *Sugden v. St. Leonards* seems to me to be likely to grow stronger; the only question is whether and when the Legislature should intervene and how far the Judges are entitled to help this tendency. The very existence of the rule of exclusion in Indian law is a thing which we deny and hence we need not go into the details of English law on this point except in so far as it is necessary to explain the psychological causes of the views that the Judges adopt as to the scope of section 11 on the one hand and that of sections 32-39 on the other.

The view adopted in the case of *Bela Rani v. Mahabir Singh* comes to this that sections 32-39 imply a rule of exclusion general rules of relevancy, to use the words of Mr. Stephen—to which sections 32-39 enact exceptions. The law as to admissibility of statements is often confused with the law as to admissibility of judgments. There are important differences which are usually overlooked, namely, the following :—

(i) Section 43 distinguishes between the use of a judgment to prove its existence and the use of a judgment to prove the truth of the opinions expressed in it and with regard to the latter kind of use of judgments, lays down an express rule of exclusion, whereas in the case of statements no such differentiation of the uses is made and there is no express rule of exclusion. Sections 32, 33 etc. speak of statements being relevant; they do not distinguish between the *making* of the statements and the facts stated in the statement. Mr. Banerjee J. says in the case cited by us, "The *making* of such statement is, no doubt, a fact which would make the fact in issue highly probable and as such might be admissible in evidence, but it must be proved before it can be admitted." These sections, according to the interpretation of this learned Judge, would forbid proof even of the

only so many illustrations of the *general* rules, esp., of section 11 and so makes them superfluous. The answer is, there can be no doubt that sections 6-16 lay down the *general* rules as to relevancy. In p. 72 of the Introduction, Mr. Stephen says, "relevancy was very *fully* defined in the Evidence Act (Ss. 6-11 both inclusive)". If these sections fully define relevancy all other sections as to relevancy must be amplifications of these, esp. Sec. 11. The necessity for enacting these provisions separately is to dispense with the enquiry whether the probative force is sufficient for section 11. These sections (Ss. 17-39) admit some statements when they fulfil some requirements without discussion as to their weight. Section 11 requires preliminary discussion as to *weight* before admitting any fact (including a statement). What sections 17-39 do is to dispense with this condition precedent to admission. Far from being mere illustrations they are in a sense, so many independent rules and being independent rules of relevancy, without the help of a rule of exclusion, they are of co-ordinate jurisdiction with sections, 6-16. If they lay down the law as to statements exhaustively, then no statements can be admitted under Secs. 6-16, which, as we shall see, is not the case. Our theory does not make the "elaborate provisions" of secs. 32-39 superfluous but gives them, in a sense, the status of independent rules, co-ordinate with sections 6-16; whereas the implied enactment theory introduces irreconcilable conflict between Secs. 17-39 (Ss. 32-39) and sections. 6-17.

We pass on next to consider the effect of sections 6-16 in admitting statements.

(To be continued).

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REVIEWS.

Legal Practitioners Act by Kshitish Chandra Chakrabarti, M.A., B.L., M. C. Sarkar & Sons, Calcutta, 1923, Rs 3.—This is an extremely useful edition of the Legal Practitioners Act with a commentary and historical introduction. The introduction rightly lays stress upon the position of the legal practitioner in ancient and mediæval India and shows that the system is not a modern innovation. The commentary gives the substance of all important judicial decisions and we are glad to find that the rules deducible are accurately stated. The work is in short marked by the same excellence as characterised the previous publication of the author.

The Court Fees Act and the Suits Valuation Act by M. N. Basu M.A., B.L., Eastern Law House, Calcutta, 1923.—We are glad to welcome this valuable edition of the Court Fees Act. Mr. Basu is now Stamp Reporter on the Appellate Side of the High Court and has had occasion to make a special study of the provisions of the two Acts he has annotated. The Commentary is exhaustive and so far as we have been able to test refers to every case of importance. The Classification adopted in arranging the notes is simple and logical and practitioners in search of cases on a particular point can reach the relevant portion almost at a glance. We have no doubt the work will have a very large circulation.

The Court Fees Act by M. Krishnamachariar, M.A., M.L., Ph. D., P. R. Rama Iyar of Madras, 1923.—The learned author of this Commentary has previously laid the profession under obligation by his works on Easements, Trusts, and Torts. The present work is marked by the same features as his previous contributions, namely, lucidity and thoroughness. The Editor has so arranged the provincial amendments as to enable the reader at a glance to appreciate their comparative effect. The notes are full and references have been given to decisions from all the Indian Courts. As the Act is in force throughout India there is evidently room for more than one good edition.

The Calcutta Law Journal.

RULE AGAINST HEARSAY AND THE INDIAN EVIDENCE ACT.

Section VI. Admissibility of Statements under Secs. 6-16 i. e. Sections not Referring specifically to admissibility of statements.

The sections referring exclusively to statements enact that all statements which satisfy the requirements laid down in the sections relating exclusively to statements are admissible statements ; from this to infer that all admissible statements are statements which satisfy the requirements laid down in the sections relating exclusively to statements is to commit the fallacy of distributing a term in the conclusion which was not distributed in the premise. The Act itself apart from this logical consideration, shows that statements may be admitted independently of sections 17-39 which relate to statements. A rigid rule of exclusion could not have been inserted just before these sections as is the case with regard to judgments (cf. section 43). We have seen that the sections relating to statements do not distinguish between the *making* of a statement and the *facts stated* in a statement. This want of discrimination pervades the illustrations (of admissibility of statements) appended to some of the sections relating to relevancy generally (sections 6-16). We have seen before that one of the reasons which led Mr. Stephen to avoid the rule against hearsay was that he thought the terms of defamation or of threat would be made inadmissible by such a rule (see p. 6 of Mr. Stephen's Introduction where he discusses the various senses of the rule that hearsay is no evidence). No distinction is drawn between statements and other facts except in the explanation to section 8 which says that conduct does not include statements unless they accompany and explain acts other than statements. The proviso suggested by Mr. Stephen to section 11 is an attempt in this direction but it has not been enacted. Therefore there is nothing in the Act itself to differentiate the scope of section 11 from that of other sections in this respect ; i. e. a fact includes a statement for purposes of admissibility under section 11. When in p. 169

of his Introduction he tries to refute the contention that a statement made out of Court may be admissible under section 11, he never says that a fact shall not be held to mean a statement under section 11 and the very proviso which he suggests shows that such a distinction was not in his contemplation. Some of these sections have been made much wider than the English law on the subject, in order to avoid subtle discussion as to admissibility they have been made to differ substantially from English law. The Act (and Mr. Stephen) sometimes shows confusion between a liberal interpretation of law and abrogation of it. Though section 5 says that evidence may be given of facts in issue and of relevant facts, the very wide definition of relevancy given in some of the sections, namely, 6, 7, 8, 9, etc. are so wide as to leave everything to the good sense of the parties and their lawyers. If it is remembered that facts relevant to relevant facts are themselves relevant, then the practical uselessness of these rules will become manifest. These sections throw the door open to hearsay facts with negligible probative force; whereas section 11 authorises the introduction of evidence of high degree of probative force, allowing the Court to reject the evidence if it does not come up to the standard. The commentators here have little to say as to the scope of sections 6, 7, 8, etc. but they usually lament over the fact that apparently very wide scope has been given to section 11. In this they have, to some extent, the support of the personal intention of Mr. Stephen. Had he possessed a completely free hand in the matter he would not have retained section 11 in its present form, would have added proviso which he has suggested; the effect of that proviso would have been that no statement could have been used under section 11 for the purpose of proving the facts stated. This would have been a near approach to the rule against hearsay; but without the help of similar provisos to some other sections, eg. sections 6, 7, 8, 9, 14, etc. it is doubtful whether the Act, properly interpreted, would have rejected hearsay unconditionally as in England.

We now turn to a brief discussion as to the effect of sections 6-16 on the admissibility of statements for the purpose of proving the facts stated.

Section 6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

III. (a). A is accused of the murder of B by beating him. Whatever said or done by A or B, or the by-standers at the beating, or

so shortly before or after it as to form part of the transaction is a relevant fact.

Ill. (c). A sues B for libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

The section is nothing but a loose paraphrase of the supposed rule that facts forming part of the *res gestæ* are admissible in evidence. This phrase has been criticised severely by Prof. Thayer; Prof. Wigmore, Lord Blackburn once said "If you wish to tender inadmissible evidence, say it is part of the *res gestæ*". Section 6 is open to all the criticisms to which the *res gestæ* rule has been subjected. The section admits spontaneous exclamations and verbal acts. Ill. (c) shows how wide the scope is. (The phrase *res gestæ* originated as a check upon the inroad of the rule against hearsay into statements forming *part of the issue* and those constituting verbal acts.) Section 6 admits letters between parties relating to a subject out of which a libel arose, *though they do not contain the libel itself*.

Section 7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Section 7 is somewhat similar to section 21 as regards its scope. it admits facts which are the cause, effect or occasion of a fact in issue or of a relevant fact.

Section 8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party to any suit or proceeding, in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Expl. 1. The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to effect the relevancy of statements under any other section of this Act.

Expl. 2. When the conduct of any person is relevant, any state-

ment made to him or in his presence and hearing, which affects such conduct, is relevant.

Ill. (f). The question is whether A robbed B.

The facts that, after B was robbed, C said in A's presence 'the police are coming to look for the man who robbed B' and that immediately afterwards A ran away, are relevant.

Ill. (g). The question is, whether A owes B rupees 10,000. The facts that A asked C to lend him money, and that D said to C in A's presence and hearing, 'I advise you not to trust A, for he owes B 10,000 rupees,' and that A went away without making any answer, are relevant facts.

Ill. (h). The question is, whether A committed a crime. The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter are relevant.

Ill. (j). The question is whether A was ravished.

The fact that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under section thirty-two, clause (one), or as corroborative evidence under section 157.

Ill. (k). The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the term in which, the complaint was made are relevant.

The fact that, he said he had been robbed, without making any complaint, is not relevant as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (1) or as corroborative evidence under section 157.

Spontaneous exclamations of a party come under section 8 ; a statement to be admitted under section 8 must accompany and explain conduct and may amount to exclamations ; however attenuated the exclamation, it must differ from mere narration (cf. the difference between complaint and narration in ill. j & k) ; exclamations generally will fall under section. 6.

This section deals in a confused way with spontaneous exclamations and implied admissions as will appear from the reference to the parties and their agents. That there was such a confusion in the mind of Mr. Stephen will appear from his remarks on the case

of *R. v. Fowkes* that the evidence in that case might or might not have been admissible according as the window had been open or shut. Stripped of details, the facts of the case were : the accused was charged with murdering the deceased by shooting him through a window ; one of the persons who were sitting inside the room with the deceased shouted as the gun was fired, " There's the butcher", a name by which the accused was sometimes known. Evidence of the exclamation was allowed. Mr. Stephen thought that the admissibility of the statement depended on whether it was made in such a way as to require the accused to say " no" to the accusation by the statement. The only justification for this confusion is that the exception in favour of spontaneous exclamations was not then explicitly recognised by English text writers, though the judges accepted it in a number of cases, namely, *Aveson v. Kinnaird* ; *R. v. Fowkes* etc. Cockburn C. J. failed to recognise this exception in *R. v. Bedingfield* in which he decided that such statements could not be admitted unless it was a verbal act or amounted to admission (or amounted to dying declaration). Ill. (g) is a case of implied admission ; Ills. (j) & (k) are cases of spontaneous exclamations.

Section 8 does not distinguish between the circumstantial use of a statement and its use for the purpose of proving the facts stated and so once it admits a statement it does not put any limitation on the use of the statements. Ills. (f) & (h) are cases of circumstantial use of statements to prove knowledge ; as these statements are not intended to prove the facts stated, they are not subject to the rule against hearsay ; exclamations are subject to the rule but are saved by an exception recognised in their favour. Letters found in a man's possession may, besides showing knowledge of contents amount to admission on proof of the person's identifying himself with the contents, and acting in accordance with them. Sections. 17-31 refer to admissions which are statements oral or documentary, made by a party or his agent and does not seem to refer to admission by conduct. Section 8 does not impose any limitation on the use of the statements ; ills. (j) and (k) say that the terms of the complaint are relevant ; unlike the terms in ill. (h), these will affect the proof of the facts stated and so the statement is not used merely circumstantially. The section draws no distinction between the various uses of a statement and imposes no limitation on the use.

Section 9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of

any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Ill. (d). A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A 'I am leaving you because B has made me a better offer'. This statement is a relevant fact as explanatory of C's conduct which is relevant as fact in issue.

Ill. (e). A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it, 'A says you are to hide this'. B's statement is relevant as explanatory of a fact which is part of the transaction,

Ill. (f). A is tried for a riot, and is proved to have marched at the head of a mob. The cries of the mob are relevant, as explanatory of the nature of the transaction.

This section also deals with verbal acts as do sections 6 & 8 [and section 6 as section 8 is nothing but an amplification of section, (7)].

Section 10 admits things said or done by conspirators in reference to their common intention even though not in *execution or furtherance* of common purpose as is necessary under English law; section 10 admits even statements made by a conspirator after his connection with the conspiracy has ceased and thus carries the doctrine of implied agency far beyond English law. The illustration makes it clear that the contents of a letter written by a conspirator giving an account of the conspiracy even though the account may relate to events that took place after he left the conspiracy and may be used against another who joined after he left the conspiracy. This is clearly hearsay.

Section 13. Where the question is as to the existence of any right or custom, the following facts are relevant:

(a) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence:

(b) particular instances in which the right or custom was claimed recognised or exercised, or in which exercise was disputed, asserted or departed from.

A statement satisfying with the conditions laid down may amount to a *transaction* or an *instance*; if it amounts to an act—a verbal act—it is not open to the rule against hearsay. Even when it does not so amount, it may be admissible under this section even

for the purpose of proving the facts stated ; in England evidence of this kind is admissible only in the case of public right on the strength of a special exception to the rule against hearsay ; in the case of private rights there is an exception in favour of ancient documents. Section 13 is due to mixture of extension of the verbal act doctrine and relaxation of the ancient document doctrine (section 90 creates a presumption of genuineness, in the sense of due execution, in favour of documents thirty years of age or more and does not relate to its probative force as to the facts stated).

Section 14. Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind, or body, or bodily feeling is in issue or relevant.

Expl. I.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

III. (k). The question is whether A has been guilty of cruelty towards B, his wife. Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts.

III. (l). The question is, whether A's death was caused by poison. Statements made by A during his illness as to his symptoms, are relevant facts.

III. (m). The question is, what was the state of A's health at the time when an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question are relevant facts.

III. (p). A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime, is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is relevant. •

This section does not distinguish between statements about a state of mind etc. and a statement used circumstantially to show a state of mind etc. ; the former are subject to the rule against hearsay and are saved from its operation by an exception (cf. *Aveson v. Kinnaird*). This distinction is not drawn clearly by celebrated English writers on the subject who treat all such statements together as a kind of circumstantial evidence, the inference being from an effect (manifestation or expression) to its cause. Mr. Stephen has got the authority of Mr. Taylor (and Mr. Phipson) on his side.

These sections (sections 6—16) often admit statements and when they admit them no limitation is put by these sections on the use of the statements. Statements forming parts of the issue, those constituting verbal acts and those used circumstantially to prove some state of mind etc. are mixed up with statements used for the purpose of proving the facts stated. In order to avoid subtle discussions, some of the limitations recognised by English law are not required by these sections and the result is that the door is thrown open to admission of evidence which is hearsay or is of little or no probative force; little use is, however, made of these relaxations of the law of evidence and hence there are few cases about sections 6, 7 and 9. Though section 5 admits evidence of facts in issue and relevant facts only, the definition of relevancy is so wide that little practical benefit is derived from (and little misuse is made of) these sections and the parties and their lawyers are thrown on their common sense and ordinary principles of reasoning. This being so, I do not understand why Mr. Stephen and his commentators are so eager to restrict the scope of section 11 which admits facts with a high degree of probative force. This is left to the discretion of the Court on which Mr. Stephen himself relies largely as is shown by section 165 of the Act which authorises the judge to put any questions and section 167 which enacts that a decision shall not be varied for mere improper admission or rejection of evidence without proof of consequent failure of justice. The only psychological reason lies in the claim to *originality* made by Mr. Stephen in favour of a set of positive rules of relevancy which he thinks he discovered for the first time.

Even if Mr. Stephen had succeeded in enacting the proviso to section 11 which he suggested, statements made out of Court would not have been rejected unconditionally. They may become admissible under section 7 read with some other section. Section 7 defines relevancy in quasi-scientific language in terms of causality whereas section 11 defines it in popular language, to use the words of Mr. Justice Markby. A proviso similar to that suggested to section 11 would become necessary in the case of section 7. Thus a statement showing a state of mind contemporaneous with the state of mind is admissible under section 14 as proof of the state of mind, say knowledge, which is a state of mind; section 7 authorises an inference from knowledge of facts to the facts as knowledge is a psychological effect (impression on the mind) produced by facts, e.g., the contents of a document executed by person; therefore, to take a concrete case, a post-testamentary declaration by testator would be

admissible to prove the contents of the will. English law admits expressions of intention to execute a will in a particular way as tending to prove the contents of a will.

I do not see how knowledge is less probative than intention to this respect; in both cases there are two steps in the reasoning:—(i) from the expression of knowledge or intention to knowledge or intention and (ii) from intention or knowledge to facts. Section 14 does not distinguish clearly between a statement about a state of mind and statement which evidences the state of mind circumstantially, it admits a statement about a state of mind provided it is contemporaneous with the state of mind and is specifically connected with the state of mind. Knowledge is a continuous state of mind and a statement about a fact known may be such a fact as to show knowledge just as a statement about a fact intended to be done may show intention. There may be various circumstances affecting the weight in each case; in the case of a statement showing knowledge, there may be a wilful attempt to mislead and various other circumstances; so in the case of a statement showing (expressing) intention, there may be subsequent change of state of mind and therefore the tendency of the statement of intention to prove the facts intended may be very weak; first the intention at the time of making the statement is proved; from this the future intention and thence the facts intended; in the case of knowledge the links are fewer in number. The inference from a statement showing knowledge to facts may be excluded only by an express rule of exclusion. The existence of such a rule of exclusion may lead to a distinction between statements by a person as to what *he intends to do* and statements by a person as to what *he has done* and the former may be admissible without the latter being so. This is the present state of English Law as enunciated by Mellish L. J. in *Sugden v. St. Leonards* where he differed from the majority of the judges who opined that the post-testamentary declarations of a testator are admissible to prove the contents of a will. According to Mellish L. J. declarations of intention prove intention at the time which corroborates other evidence of contents; but a declaration of the contents of a will that has been executed is "simply a statement of fact within his knowledge" and therefore, is inadmissible by the "general rule that hearsay evidence is not admissible to prove a fact that is stated in the declaration." The distinction between the two forms of expression of intention, namely, "I shall execute a will with these contents" and "I intend (or my intention is) to

execute a will with these contents" is similar to the distinction between the two forms of expression of knowledge, namely, "I have executed a will with these contents" or "These are the contents of my will" and "I know (or I possess knowledge) that these are the contents of my will," when a man states a fact which is obviously within his knowledge, the statement is just as much about the facts as about his knowledge. If the statement as to facts known be excluded, there is no reason why a statement as to facts intended should be admitted. If, as we have seen, there is no express rule of exclusion in India, such a statement about fact known will be admissible under sections 7 and 14 read together, even though it might not have been admitted under section 11. We have however seen that as the proviso suggested by Mr. Stephen has not been added to section 11, such a statement may, under the circumstances of a particular case, be admissible under section 11. The question will arise, may not such an argument be advanced in favour of *all* statements made out of Court? The answer is, yes, such an argument may be advanced but will not be advanced as offering statements made out of Court, must rouse the suspicion of the Court and most probably will lead to a presumption that the evidence (if not also the cause) of the party tendering such evidence is weak. Just as sections 6, 7, 9 may lead to the introduction of hearsay and a large amount of materials with little or no probative force but does not do so on account of the common sense of the parties and their pleaders, so also the mere absence of a rigid rule of exclusion will not lead to the introduction of statements made out of Court. Moreover section 11 does not abrogate all rules of evidence; the sections e. g. 6, 7, 9 etc., in respect of which Mr. Stephen claims originality are rather open to that charge, to some extent; but section 11 requires the parties tendering any evidence under the section to satisfy the Court and asks the Court to be cautious in admitting evidence; and the provision in the Codes of procedure as to appeal, revision etc. will make the Courts of the first instance very careful in the matter. The effect of this interpretation will be to give elasticity to the principles underlying the exceptions to the rule against hearsay in England.

Conclusion.

Jessel M. R. said in *Sugden v. St. Leonards* that the rules of evidence were made for the purpose of furthering truth and justice and that Courts should not be anxious to restrict them narrowly. A liberal interpretation does not mean abrogation of law. There

are two certainties about the Indian Evidence Act, in spite of its inaccuracies and vagueness in many places and these are (i) that section 11 expresses the intention of the Legislature though it may, to some extent, go against the intention of Mr. Stephen and (ii) there is no rigid rule of exclusion of statements made out of Court in the Indian Evidence Act.

In admitting a statement under section 11 Anglo-Indian Court of Law must naturally be guided by the principles underlying the exceptions to the rule against hearsay. And this interpretation will make Indian Law accord with the spirit of modern criticism and will make Indian Law less capricious than English Law so long as the principle underlying the exceptions to the rule against hearsay in England are not recognised as elastic by the Judges or made so by the Legislature.

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REVIEWS.

The Indian Income Tax Act 1922, by P. D. Aiyangar B.A., B.L., Associated Printers, Madras, 1922.—This handsome volume deals with a subject of great practical importance. The Income Tax Act passed last year consolidates the law relating to Income Tax and Super-Tax in British India and in many matters substantially alters the law in the light of the experience gained by the working of the previous acts. A new commentary is consequently imperatively needed and the one now before us will be deservedly welcomed as a solid piece of work. The text is carefully annotated by reference to decisions English and Indian and their substance is judiciously and tersely stated. The appendix sets out the text of the repealed acts and also makes available important papers relating to the legislation of 1922. We have no doubt that the volume will meet with the recognition it fully deserves.

The Law of Gaming and Wagering by S. G. Velinker, B.A., LL.B., 3rd Ed. Bombay, 1922.—This volume deals with the Civil and Criminal Law of Gaming and Wagering. The work is really of great merit and it is unfortunate that the major portion of it is put in the

form of annotations to the sections of a Local Act. The substance of the English and the Indian Decisions is well put and it is worthy of consideration whether in the event of a new edition the entire work should not be recast into the form of a text-book with the statutes placed in an appendix and annotated by references to relevant passages in the text.

The Law of Monopolies in British India. (Tagore Law Lectures, 1916) by P. K. Sen M.A., LL.M. Calcutta, 1922.—We are pleased to extend a warm welcome to the volume of lectures on the law of monopolies delivered in the year, 1916 by Mr. Prasanta Kumar Sen as Tagore Professor of Law. It will take a distinguished place in a famous series of legal treatises. It is in no sense a digest or a book by a book-maker. On the other hand it contains in many places an illuminating exposition of first principles and a refreshing criticism of judicial decisions. It is pre-eminently a book for careful study by all students of law, young or old and not for mere occasional consultation by the busy practitioner in search of precedents to support a spacious contention. We hope the book will secure a wide circulation.

The Calcutta Law Journal.

THE PROPOSED BILL TO AMEND THE BENGAL TENANCY ACT VIII OF 1885.

The Bill introduced into the Bengal Legislative Council for the purpose of amending the B. T. Act, 1885, embodies certain provisions, which, if passed into law, will effect drastic and far-reaching changes in the economical life of Bengal, both urban and rural. Yet strange to say, it has not attracted that degree of public attention which it undoubtedly deserves.

Before criticising its principal provisions in detail, it is necessary to take note of the fundamental principles on which it is based.

The *cardinal defect*, which the Committee appointed to consider the amendment of the Act, found in its provisions, and which they have laboured hard to remove, may thus be stated in their own words :—"The main defect of the B. T. Act at the present day is that it does not provide adequately for the extraordinarily complicated state of agrarian relations which has grown up owing to the wide-spread adoption both by landlords and by tenants of the practice of sub-division and *subinfeudation of rights in land*. The *principle of the settled raiyat* adopted by the framers of the B. T. Act is a satisfactory protection of the customary rights of the resident raiyats of the village, and affords almost a complete solution of the status problem in areas where there are *only two* persons interested in the land, namely the proprietor landlord and the cultivating tenant. But in Bengal at the present day"—the Committee point out—"there is very often a *whole chain of persons interested in the land both as rent-receivers and as rent-payers*, between the proprietor at the top and the cultivating tenant. Under the law as it stands, the *occupancy tenant right* can only be *enjoyed by one person in the chain*." It is owing to "this limitation, of the legal occupancy right to a single individual among the numerous persons interested in the land" that "the law is not properly adapted to the complicated state of subinfeudation which actually exists," And "it frequently happens that the occupancy tenant *right gets into the*

Main defect of
B. T. Act.

Chain of persons
interested in land.

Occupancy right
enjoyed by one only

Not necessarily
cultivator who is
often tenant-at-will

hands of the wrong person and the *cultivating* tenant who ought to have the right, finds himself in the position of a *tenant-at-will*."

Remedy proposed.

The problems, therefore, which the Committee set themselves to solve are :—(1) To prevent the non-cultivators from acquiring the right of occupancy, and (2) To provide that only the actual cultivators should acquire and retain that right.

Conferring
occupancy right on
persons holding land
under the raiyat.

In their opinion nothing will serve to prevent the acquisition of occupancy right by a 'wrong person,' if that status is confined or limited to one of the persons interested in the same plot of land. Under the circumstances the best solution of both of them which the committee find is "to give to all persons holding land under the person who enjoys the legal status of a *raiya*t, right of occupancy as against his immediate landlord." Most of the persons who hold land under the raiyat have, under the present law, the status of an under-raiyat, and are commonly known as the *Korfa* raiyats, while some are commonly called the *Bhag-chasis*, *Bhagidars*, *Burgadars*, *Adhidars*, or *Adhiars*. The Committee propose to confer the occupancy tenant right on all these persons.

i.e. Under-raiyat
and Bhagidar etc.

Which in
Committee's
opinion they in fact
enjoy.

This proposal, the Committee assure us, "is based on the fact that although the law confers the occupancy tenant right on only one person, yet, as a matter of custom and practice, the essentials of occupancy right are ordinarily enjoyed by most of the persons in the chain of those who are interested in the land as rent-receivers or as rent-payers, or as both." * * "This is the essential element of a *permanent tenure* and most of the tenures in Bengal, other than those held under leases for limited periods, enjoy it. It attaches under the existing Act also to all *raiya*ti holdings other than those of non-occupancy raiyats and *under raiyats*, and even in the case of the latter, the possibility of the acquisition of the right by custom is recognised by the B. T. Act."

Committee could
not agree to this
proposal.

To this fundamental principle very few persons belonging either to the landlord, or to the middle, or to the cultivating class can agree. In fact, though the Report states that the members of the Committee "sign the Report in token of our agreement in the matter of the general principles which should be followed in the amendment of the Act," the Minutes of Dissent attached to it by almost all the members (16 out of 18), will satisfy all that even in this matter they were not, and could not have been, unanimous. The majority represented the interests of the landlords, only four of them imposed upon themselves the task of protecting the interests of the cultivating class, and there was none to look after

the rights of the middle-class. Yet, strange to say, no party is satisfied with the fundamental principle of the Bill.

It is very difficult to follow the reasonings by which the Committee have discovered the innate defect in the Act and the remedy they have found out for removing the same. In fact, the statements made by the Committee regarding these matters contain *half-truths*, which are worse than whole errors and are themselves *contradictory* to one another, shewing that the Committee could not form any clear idea at all of what they ought or sought to do.

could not form clear idea of it.

Subinfeudation root of all evils.

Subinfeudation root of all evils.

Two classes.

The Committee have come to the conclusion that "the wide spread *subinfeudation of the rights in land* both by landlords and by tenants", prevailing at the present day, is at the root of all the evils. To judge the matter correctly, it is necessary to keep separate and to distinguish between the *two classes* of subinfeudation, namely, that of the *right to receive rent*, in which case the rent is leased out, and not the land, and that of the *right to cultivate* the land, in which case the cultivable land itself is leased out. The Committee however have ignored or forgot the distinction between the two cases which is *fundamental*,

Subinfeudation of right to receive rent.

Several grades of rent-receivers all enjoy essential of occupancy right.

With regard to the former, it must not be forgotten that it is a *necessary consequence of the Permanent Settlement*. By this arrangement, the government gave up a portion of its land-revenue in favour of the zemindars, contenting itself with a fixed amount; and assured its punctual payment without any labour and risk attendant upon its collection from individual tenants. The zemindars were not slow to follow the example set to them and immediately began to dispose of their zemindari in a similar manner. In course of time, their lessees too sublet their interests on precisely similar terms to other persons. These again sometimes similarly underlet. And *subletting has in very many instances continued several degrees lower*, and in some places there are as many as a dozen gradations between the zemindar at the top and the cultivator of the soil at the bottom. The Committee are therefore right so far that "there is between the proprietor at the top and the cultivating tenant a chain of persons who have no other interest in the property than that of mere rent-receivers." (who have the status of *tenure-holder* as defined in the Act), "Most of the tenures in Bengal (other than those held under leases for limited periods) enjoy" as the committee themselves point out "the essential elements of occupancy right." If that is so, there is no room for complaints so far as these rent-receiving tenure-holders are concerned. Sir Henry Cotton in his "Memorandum of Land Tenure", expressed himself

No proposal for limiting it.

Extremely injurious to cultivators.

Protection of cultivators.

Occupancy right conferred by

Rent Act X of 1859

in favour of this system on the ground that it tended to secure a wide diffusion of profits, and the gradual accession to the wealth and influence of small 'proprietors.' But that was secured at the expense of the cultivators. It cannot be denied that *the system proved extremely injurious to the right of the cultivators* of the soil. For it placed them *en masse* in the hands of these middlemen, who speculated upon the opportunity they were able to command of realising extortionate rents from them. The Committee have not at all thought it necessary to consider their case, except in minor particulars or to put a stop to or even to limit this system of sub-lease of the rent receiving right (1).

The interests of (some at least of) the cultivating tenants have always been an object of special care of the government and "the recognition of the right of occupancy" in them has been "the essential feature of the tenancy legislation in Bengal," ever since the days of the Permanent Settlement. These were the *resident raiyats of the village*, generally known as the *Khud Kasht Kademi raiyats*. The Regulations passed subsequent to the Permanent Settlement recognised their heritable right to hold the land they cultivated and to be protected from ejectment therefrom. The new-comers to the village were, however, required to take settlement of the lands from the zemindars for the purpose of cultivation, on terms imposed by them and might be mere tenants-at-will. They were known as the *Paikasht raiyat*. The old Regulations contained no indication as to the length of time required for enabling them to acquire the *kademi* rights, and no provision for the protection of such rights, which were thus of *precarious* character, and this caused very great hardship on them. Further, besides those who had been *Khud Kasht* at the time of the Permanent Settlement, there were other raiyats who since the time had by long residence in the village in which they held and cultivated the lands and who in the belief and feeling of the people became entitled to the *Khud Kasht* rights. And doubts exist as to whether these were included in the class protected by the Regulations. These matters were settled by the Rent Act X of 1859 which laid down that the *twelve years' cultivation of the same plot of land*, was generally speaking, sufficient for the purpose. The same substantial rights as had been enjoyed by the *Khud Kasht Kademi raiyats* were thus conferred on a large class of tenants, known as the *Pai Kashts*, who

(1) The High Court in recent years have upheld the creation of the intermediate tenures over the head of the Putni.

were hitherto merely tenants-at-will and liable to be rackrented. The *two classes* were thus *assimilated into* what then for the first time came to be called the "*Occupancy raiyats*." The result was that continuous cultivation for twelve years of the *identical* plot of land was generally speaking, sufficient for the purpose. This requirement however, was a serious infringement of the rights of the *resident raiyats*, as it placed them in the position of *tenants-at-will in respect of all lands* of which they could *not* prove *twelve years' continuous occupancy*. The B. T. Act, however, provided that the twelve years cultivation or occupation of the *same plot* was not at all necessary for a resident raiyat of the villages. The cultivation of any land *within the same village* for twelve years was only required before a raiyat could become a "settled raiyat" of the village. And all "settled raiyats" were declared to "have occupancy right in all lands for the time being held by them. The B. T. Act, by thus returning to the old principle of the *Khud Kasht* raiyat, gives the cultivator of the soil occupancy right not only in the lands held by him actually for twelve years, but in *any land for the time being held by him in the village*. He is to shew that he has held some land within the village boundaries continuously for twelve years, and he then becomes a '*settled raiyat*' of his village, and acquires occupancy right in all the lands which he may hold in the village at the present or in any future time. Thus, the Rent Act of 1859 and the B. T. Act of 1885 conferred on a considerable portion of the raiyats that protection from rack-rent and ejectment at the hands of the landlords which they had so sorely needed. "The result has been that a proportion varying from four-fifths to nine-tenths of all the raiyats in the Province have occupancy rights in the lands. Of the remainder, a small number holds lands at fixed rates of rent, and the rest are more or less tenants-at-will," and are now known by the name of the "*non-occupancy*" raiyats. That in the opinion of the Committee the protection is adequate is apparent from the fact that nowhere in their Report nor in the draft Bill do we find any proposal regarding the improvement of the condition or safe-guarding the interests of the raiyats.

Bengal Tenancy
Act VII of 1885.

No proposal for
protection of raiyat

With regard to the subinfeudation of the right to cultivate the land, which takes place in the case of the raiyats ceasing to cultivate the lands themselves, but getting them cultivated by others to whom they are let out (i.e. by *under-raiyats*) it must be admitted that the *raiya*t, both occupancy and non-occupancy, were *primarily cultivators* of the soil. The original conception of a raiyat was that he entered upon the land for the purpose of culti-

Subinfeudation of
right to cultivate
land.

Raiyat primarily
cultivator.

vating it, or bringing it under cultivation either by his own personal labour, or that of his servants and followers, or by means of persons who occupy a portion of the land, giving him in return a share of the produce, according to the custom of the country, and afterwards a money-rent when it suited both parties to make the arrangement. A *raiya* holding being created in this manner, *did not cease to be such because the raiyat subsequently sublet*, there being nothing either in his contract or in the custom of the country to prevent him from doing so, and practically converted himself into a middle-man (i.e. a tenure-holder as defined in the B. T. Act). It must be borne in mind that the practice is of recent growth and owes its origin to the persistent demand for land which arose in the middle of the last century. A historical study of the rent law will convince any one that at the time of the Permanent Settlement, 1793, the practice was seldom resorted to. Even at the date of the Rent Act of 1859, it was not so widely prevalent as to call for any legislative interference. But during the period from 1859 to 1885, the year of the B. T. Act, it threatened to become so widespread that the government had to intervene in order to check its further expansion. This process of conversion has long been going on in every district of Bengal. That while undergoing this process there should be some doubts as to how far the tenant was to be governed by the incidents of the *raiya* condition which he has been leaving or by those of the tenure conditions to which he has been approaching is only natural.

Subsequent sub-
lease by him.

Mere lapse from
his original
condition.

If, therefore, some of the *raiya*s do not now engage themselves in actual cultivation, that will *merely be a lapse from their original condition*, and they should be reclaimed and brought back into touch with the land and to cultivate it. To do so it may be necessary either to *take away* from them *the right to sublet* which they have so long enjoyed and exercised although sometimes to their detriment, or to *deprive them of the lands* which they have ceased to cultivate and to vest them in those who actually cultivate them, *namely* the under-*raiya*s and the *Burgadars* and the like. The Committee have rightly pointed out that any measure *forbidding* subinfeudation of holdings *altogether* "would be impracticable to enforce without *wholesale disturbance of existing rights*," which, under any circumstances, is quite undesirable. Further, to *take away* from the *raiya*s *the privilege of sub-lease* must in many cases be extremely hard for them. For they may, for various reasons, be prevented from cultivating the land themselves. The Legislature, therefore, has wisely provided in the B. T. Act for the *raiya*s

Which is
impracticable and
undesirable.

Remedy.

To take away right
of sub-lease.

occasionally letting out the whole or a portion of their holdings for a *limited period* (nine years), and under the law as interpreted by the High Court a sublease granted by the raiyat for more than nine years is *totally void* even as between the parties themselves. The fact, however, cannot be denied that they *have not kept themselves within the desired limit*, and in many instances sublet their lands for periods much more than what is allowed by the law (nine years) and sometimes even in perpetuity.

To limit period of sub-lease.

Under the circumstances, the only check which the Committee have thought fit to impose upon the right of the raiyat to sublet is that he must, in all cases, however short the period of the sublease may be, *obtain the consent of the landlord*. This proposal, if accepted, will result in two-fold evils. The raiyat will find it *extremely difficult to sublet even temporarily* (for a period of less than nine years as they are now able to do), as in that case also he will have to purchase the consent of the landlord, and that will require money which he has not. This will cause very great hardship to him. And if the landlord's consent is secured there will be *nothing to check* the sublease by him for long periods and *even in perpetuity* and thus to convert himself into a rent-receiver which it is the policy of the law to prevent. Under the present law as interpreted by the High Court a *sub lease granted by the raiyat for a period exceeding nine years is totally void*, even as between the parties themselves. This has enabled the raiyat resume *khas* possession of the land and to cultivate it himself after the expiry of the period of nine years, if he wishes, and as the law wants him, to do. The *proposal* made by the Committee to omit this restriction *will make the sub-lease binding upon the raiyat in all cases even though the period of it be much longer than nine years or even in perpetuity and will preclude him during the whole period or for ever from getting khas possession and cultivating the land himself and thus convert himself into a rent-receiver in spite of his wishes to the contrary*.

Committee's proposal to require landlord's consent in all cases.

Will not be sufficient check.

Will prevent raiyat resuming cultivation of land.

If the sublease by the raiyat permanently or for a long period is considered to be an evil (as it ought to be) and if the law as laid down in the B. T. Act and interpreted by the High Court be not found to be sufficient to check it, that is because of the vague way in which it is worded, and all that seems necessary is to *make it more definite and clear that after the lapse of the said period, the sublease granted by the raiyat will become ipso facto void*. This will also avoid the hardship which the present law undoubtedly

B. T. Act requires further strengthening to make sublease for more than 9 years void.

causes to the under-raiyat inasmuch as the raiyat can now take away the land even before the expiry of nine years.

Committee's proposal
to confer occupancy
right on cultivators.

The Committee, however, have no faith either in any such restriction or even in the one they have themselves proposed. Apparently they have thought it to be an impossible task to prevent such a state of things. And finding that "the essentials of occupancy right are ordinarily enjoyed by most of the persons in the chain of those interested in the land," save and except those who actually till the soil, and that "the cultivating tenant who ought to have the right" is in the position of a tenant-at-will; they propose to confer the same right upon "all persons holding land under * * * the raiyat". These are the under-raiyats and the *Bhagidars* and the like who admittedly have not the right now.

(To be continued.)

Radharomon Mookerjee.

The Hon'ble Justice Sir Hugh Walmsley, Kt.

We are glad to find the name of the Hon'ble Mr. Justice Walmsley in the Birthday Honours List this year. We beg to offer our sincere congratulations to him.

REVIEWS.

The Yearly Digest for 1922 by R. Narayanaswamy Iyer, B.A., B.L., Madras Law Journal Office, Madras, 1922. Rs. 5 :—The issue of this well-known Digest for 1922 will be welcomed by the profession. The features are so well-known that they need not be recapitulated. The classification is admirable, the arrangement simple and logical and the statements concise and accurate; even those who do not possess the previous issues will find it convenient to possess this volume.

Annual Comparative Tables for 1921 by Maheschandra Dutt, Patna, 1921. Re 1 only :—This is a very useful publication. There are so many different series of reports now current that no practitioner with ordinary means can afford to possess them all. Consequently all members of the profession in search of precedents find it convenient to ascertain whether a case cited from one report can be found in another report. Mr. Dutt has taken

great pains in the preparation of this modest volume and we have no doubt his trouble will be repaid.

The Court Fees Act by Janak Kishore, B.A., LL.B., Raj Press, Moradpur, Patna, 1923. Rs. 2 only :—This volume is a notable addition to the long series of annotated editions of the Court Fees Act. The special provisions current in Behar and Orissa are naturally noted with special care. The annotations are by no means mechanical and a serious effort has been made to set out the divergent views of the High Courts upon all questions of importance. The busy practitioner will find the volume quite useful.

International Labour Office Legislative Series, Volume 1, 1920, Geneva, 1922 :—We have received the first volume of the Legislative Series for 1920 issued by the International Labour Office. This series contains reprints and translations of the texts of Laws and Regulations affecting labour issued in the different countries of the world. The series is published in English, French and German and is one of the most notable undertakings of the League of Nations. Problems of Labour have long since ceased to be National and have now become International. The subject index of the Volume gives an indication of the variety of its contents and we have no doubt that copies of the publication ought to be kept in all our public libraries so as to be accessible to all interested in Labour Problems.

The Hindu Code by H. S. Gour, G.C.L., LL.D., 2nd Edition, Nagpur, Central Book Depot, 1923 :—The Hindu Code by Dr. Gour has had a rare good fortune to attain the rank of a classic in the very first edition. The second edition is in some directions an improvement on the first. One thousand new Judicial decisions and two hundred and fifty new texts have been incorporated with the result that the size and weight of the work has perceptibly increased. This however has not affected the utility of the work by reason of the fact that it is arranged as a Digest. The annotations do not affect the clarity of the statement of the substantive proposition. It is no exaggeration to state that neither the serious student nor the busy practitioner can do without this massive volume.

Hindu Law of Inheritance by Rajkumar Sarvadhikary Second Edition by Jyotiprasad Sarvadhikary with a foreword by Sir Asutosh Mookerjee, Law Book Depot, Madras 1922 :—We are glad to extend a cordial welcome to the new edition

of a truly great classic on Hindu Law. Mr. Rajkumar Sarvadhikary leapt into fame by his brilliant lectures on the Hindu Law of Inheritance delivered by him as Tagore Law Professor of 1880. The volume on its first publication was a despair of critics. Neither Sanskritists without law nor Jurists without Sanskrit could take the full measure of this performance of an erudite scholar and profound lawyer. The book however took its rightful place as a searching exposition of the fundamental principles of the Hindu Law of Inheritance. Judicial decisions were subjected to trenchant criticism while Sanskrit texts were illuminated by novel interpretations. The work soon became an authority and came to be cited by their Lordships of the Judicial Committee on more than one occasion long after the learned author had joined the majority. Ultimately the book went out of print and it was a difficult problem to undertake the preparation of a new edition on an adequate scale. The nephew of the author himself an erudite lawyer at last undertook the task. Be it said without reservation that his difficult task has been performed with ability and the work has been thoroughly revised and brought up to date. It is a matter for congratulation that the spirit and character of the work have not been altered. The work has not been transformed into a Digest or Series of disjointed propositions for the benefit of the busy practitioner in search of precedents. The work is eminently readable and deserves to be read from cover to cover ; but more than this, no one who has not read the book through at least once will ever be in a position to utilise its contents as occasion arises, notwithstanding the elaborate index furnished at the close of the volume. Isolated passages taken at random cannot be fully grasped and we would urge every student be he a practitioner or not to master courage to peruse the volume. He will find it a pleasant and profitable task, for a British Reviewer of the first edition had the generosity to acknowledge, many an English text writer might take a lesson from this book in the use of his mother tongue. Orientalists also who have no desire to practise law will find the study of this volume quite attractive as an exposition of that theory of ancestor worship which lies at the root of Hindu society and Brahminic Sociology. We trust that this monumental work will not have the misfortune of many a famous book which are known by name to all but scarcely if ever read.